

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

October Term, 1920

No. 252

MISSOURI PACIFIC RAILROAD COMPANY AND WALKER D.
HINES, DIRECTOR GENERAL OF RAILROADS, PLAINTIFFS
IN ERROR,

vs.

H. A. F. AULT.

ON WRIT TO THE SUPREME COURT OF THE STATE OF ARKANSAS

FILED FEBRUARY 22, 1921

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 733.

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HINES, DIRECTOR GENERAL OF RAILROADS, PLAIN-
TIFFS IN ERROR.

vs.

H. A. F. AULT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

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1 Pleas Before Hon. John C. Ross, Circuit Judge, in the Hot Springs Circuit Court.

MISSOURI PACIFIC RAILROAD COMPANY and WALKER D. HINES,
Director General of Railroads, Appellant,

VS.

H. A. F. AULT, Appellee.

Judgment Rendered January 29th, 1919.

Appeal Granted January 31st, 1919.

Comes the defendants Missouri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, and prays an appeal from the judgment rendered herein to the Supreme Court of Arkansas.

W. R. DONHAM,
Attorney for Defendants.

Appeal granted July 7, 1919.

W. P. SADLER,
Clerk Supreme Court of Ark.,
By J. H. CAMPBELL,
D. C.

2 Before D. M. Noble, a Justice of the Peace in and for Fenter Tp., in Hot Springs Co., Ark.

H. A. F. AULT, Plaintiff,

VS.

MISSOURI PACIFIC RAILROAD Co., Defendant.

Complaint.

Comes the plaintiff complaining of the defendant and for his cause of action states that the defendant is a corporation duly organized and existing under the laws of the State of Missouri, and engaged in the business of operating a line of railway from St. Louis, Mo., to Texarkana, Ark., and that said railroad is operated through Hot Springs Co. in said State.

That during the month of July, 1918, the plaintiff was in the employ of the defendant at Malvern, Ark. and that his duties consisted of putting baggage on the passenger trains and receiving same from the trains, and performing other work around the depot at said station that according to the terms of his employment he was re-

ceiving wages at the rate of \$2.50 *dollars* per day, and that on the 23rd day of July, 1918, the defendant discharged the plaintiff and refused to longer employ him, and at the time of his discharge there was due him for services rendered said company the sum of Fifty (\$50.00) Dollars, and the plaintiff demanded payment of same and requested the agent at Malvern, under whom he was employed, to pay him the money due him or have a valid check therefor sent to the said agent at Malvern, within seven days, and that more than seven days after he was discharged he applied to said agent for his money due him, or a valid check therefor, and at other times thereafter tried to get the defendant to settle with him, but the defendant through its agents and servants have failed, neglected and refused to pay the plaintiff the amount due him for work performed for the defendant, or any part thereof, and that the defendant still fails, neglects and refuses to pay same; and the plaintiff hereby claims the penalty allowed him under the law, that his wages be continued at the same rate until the amount due him for work performed is paid in full.

The premises considered, the plaintiff prays that he have judgment against the defendant for the sum of Fifty (\$50.00) Dollars for the amount due him at the time he was discharged, and in addition to said amount, he prays that his wages be continued from the time of his discharge, until he is paid in full.

That he have judgment for his costs herein and for all other general and proper relief.

JABEZ M. SMITH,
D. D. GLOVER,
Attorneys for Plaintiff.

Filed Aug. 10th, 1918. D. M. Noble, J. P.

4 Summons issued August 10th, 1918.
Summons served August 10th, 1918.

5 Hot Springs County, in D. M. Noble's J. P. Court, at Malvern, Arkansas.

H. A. F. AULT, Plaintiff,

vs.

MISSOURI PACIFIC RAILROAD CO., Defendant.

Affidavit for Appeal.

I, E. B. Kinsworthy, do solemnly swear that I am one of the attorneys for the Missouri Pacific Railroad Company, defendants herein, and that the appeal taken in the above entitled cause is not taken for the purpose of delay, but that justice may be done the appellant.

E. B. KINSWORTHY.

Subscribed and sworn to before me this 14th day of Sept. 1918.
[SEAL.]

GEORGE BEATTIE,
Notary Public.

6 COUNTY OF HOT SPRINGS,
Fenter Township, ss:

H. A. F. AULT

vs.

Mo. P. Ry. Co.

On the 10th day of August, 1918, the plaintiff filed before me his cause of action against defendants for \$50.00, as follows, to-wit:

Due for labor performed and penalty allowed by the Statutes.

Thereupon a writ of summons was issued against the defendants returnable on the 21st day of August, 1918, at 10 o'clock A. M. and delivered to the constable, Garland Gibbs, Deputy, of Fenter Township.

On this 21st day of August, 1918, this cause coming on to be heard, comes Garland Gibbs, Dep. Constable, and makes his return showing that the summons had been duly served more than 10 days on the agent of defendant at Malvern, Ark., and on the same day comes the plaintiff in person and by his attorney Jabez M. Smith, and the defendant not appearing is three times called but fails to answer and the Court after waiting three hours for the defendant to appear, he fails to answer or otherwise plead, and the defendant still failing to do so is declared to be in default herein.

7 Whereupon the Court proceeded to try said case, and after hearing the evidence of the plaintiff, finds, that the defendant is indebted to the plaintiff in the sum of \$50.00 for labor performed by plaintiff for the defendant and that the plaintiff was discharged by the defendant from its employ on the 29th day of July, 1918, and that plaintiff made the proper demands for the wages due him and also demanded same more than 7 days after he was discharged, and the defendant failed, *renglected* and refused to pay him and that under the law, the plaintiff is entitled to have his wages continued at the rate of \$2.50 per day from the 29th day of July, 1918, until the same is paid in full.

It is therefore considered, ordered and adjudged by the Court that the plaintiff have and recover of and from the defendant the Mo. P. R. R. Co., the sum of Fifty Dollars and that in addition to said amount, the plaintiff have and recover of the said defendant as a penalty for the nonpayment of said wages, the sum of \$2.50 per day from the 29th day of July, until the said Fifty Dollars, wages, are paid in full and that the plaintiff also have judgment for all of his costs herein expended.

Given under my hand this 21 day of August, 1918.

D. M. NOBLE, J. P.

I do hereby certify that this is a true and perfect transcript from my docket and all of the papers pertaining to said case.

D. M. NOBLE, J. P.

Transcript Filed Sept. 16th, 1918.

R. R. CHAMBERLAIN,
Clerk.

In the Hot Springs Circuit Court.

H. A. F. AULT, Plaintiff,

vs.

MISSOURI PACIFIC RAILROAD COMPANY, Defendant.

Answer.

Comes defendant, Missouri Pacific Railroad Company, and for its answer to the complaint of plaintiff, states:

That defendant denies that during the month of July, 1918, plaintiff was in its employ at Malven, Arkansas, and that his duties consisted of putting baggage on passenger trains and receiving same from the trains and performing other work around the depot at said station; and further denies that according to the terms of his alleged contract of employment that he was to receive wages at the rate of \$2.50 per day.

Defendant denies that on the 23rd day of July, 1918, or at any other time, that it discharged plaintiff or refused to longer employ him.

It denies that at the date of said alleged discharge it was due him the sum of Fifty Dollars, or any other amount, for which plaintiff demanded payment or that he requested the agent at Malvern, under whom he alleges he was employed, to pay him the money due him or have a valid check therefor sent to said agent within seven days, or that more than seven days after his alleged discharge he applied to the agent for the money due him; or a valid check therefor, or that he so applied at other times thereafter.

It denies that its agents or servants have failed or neglected or refused to pay the plaintiff any amount due him for work performed for it, or that it has failed, neglected or refused to pay him part of any sum due him for such work.

It denies that plaintiff is entitled to any penalty whatever.

Wherefore, having answered, defendant prays that plaintiff take nothing by reason of his complaint, that same be dismissed, that it have judgment for all its costs in this cause expended and for all other general and proper relief.

W. R. DONHAM,
Attorney for Defendant.

Filed January 20th, 1919. R. R. Chamberlain, Clerk.

10 In the Hot Spring Circuit Court, January 20th, 1919.

No. 1494.

H. A. F. AULT, Plaintiff,

vs.

Mo. PAC. R. R. Co., Defendant.

(Answer of Defendant Filed.)

In the Hot Spring Circuit Court, January 29th, 1919.

No. 1494.

H. A. F. AULT, Plaintiff,

vs.

Mo. PAC. R. R. Co., Defendant.

(Wage Debt.)

This day comes the plaintiff in person and by D. D. Glover and Iabez M. Smith, Esqrs., his attorneys, and comes also the defendant by W. R. Donham, Esqr., its attorney, and defendant moves the Court to make Walker D. Hines, Director General of Railroads, a party defendant, and to dismiss as to the Mo. Pac. R. R. Co.

After hearing the agreement of counsel on both sides, and the Court being well and sufficiently advised as to all matters of law and fact arising herein, doth grant said motion in so far as the making of Walker D. Hines, Director General of Railroads a party defendant herein, but overrules said motion as to the dismissal of the defendants Mo. Pac. R. R. Co., to which ruling
11 defendants excepts and save their exceptions.

Whereupon said defendants offer to confess judgment in the sum of \$31.20, but which offer is by the plaintiff declined.

And whereupon both parties announce ready for trial, and comes J. S. Tucker, and eleven (11) other members of the regular pannel of petit jurors, who are duly sworn and examined as to their qualifications, found competent and selected by both parties as a trial jury in this case.

After hearing the evidence adduced, defendant requested peremptory instructions as to penalty, which was refused, and the instructions of the Court and the argument of Counsel on both sides, the jury retired to consider of their verdict, and afterwards on this day returned into open Court with the following verdict, to-wit:

"We, the jury, find for the plaintiff in the sum of \$50.00 as debt for labor; also \$2.50 per day as penalty from the 28th day of July, 1918, until the present date.

J. M. CALDWELL,

Foreman."

It is therefore considered, ordered and adjudged by the Court that the plaintiff, H. A. F. Ault, do have and recover of and from the defendants, Missouri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, or either of them, the sum of Fifty (\$50.00) Dollars as his debt for labor performed, together with the sum of Three Hundred Ninety (\$390.00) Dollars as penalty, and all costs accrued herein for which execution may issue.

12

In the Hot Springs Circuit Court.

H. A. F. AULT, Plaintiff,

vs.

MISSOURI PACIFIC RAILROAD COMPANY et al., Defendants.

Motion for New Trial.

Come the defendants, Missouri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, and move the Court to set aside the verdict returned herein and the judgment rendered thereon and grant unto them a new trial of this cause, and for grounds of said motion, state:

- (1). That the verdict of the jury is contrary to the law.
- (2). That the verdict of the jury is contrary to the evidence.
- (3). That the verdict of the jury is contrary to the law and the evidence.
- (4). That the verdict of the jury is excessive.
- (5). That the verdict of the jury as to the penalty is unsupported by the evidence.
- (6). That the court erred in overruling defendants' objection made to the manner in which plaintiff's counsel on direct examination suggested the answers desired from the witness H. A. F. Ault, relative to the plaintiff being discharged and refused further employment by the agents and servants of defendants, and further erred in then permitting the witness to go ahead and testify relative to the alleged facts which had been repeatedly suggested to said witness by his counsel.
- (7) That the Court erred, over the objections of defendant, in permitting to be introduced in evidence by plaintiff, the purported written demand for payment of wages signed by H. A. F. Ault, the

plaintiff, and erred in permitting the same to be read to and considered by the jury.

(8). That the Court erred, over defendants' objection, in granting and reading to the jury plaintiff's requested written instruction #1.

(9). That the Court erred in reading plaintiff's requested written instruction #1 a second time to the jury.

(10). That the Court erred in refusing to grant and give defendants' requested written instruction #1.

(11). That the Court erred in refusing to grant and give defendants' requested written instruction marked "A."

(12). That the Court erred in refusing to grant and give a peremptory instruction for defendants.

(13). That the Court erred in overruling the motion of defendants to dismiss this cause as to the Missouri Pacific Railroad Company.

(14). That the Court erred in overruling defendants' motion for a peremptory instruction as to the penalty.

Wherefore, defendants pray that the Court set aside the verdict of the jury returned herein and the judgment of the Court rendered, thereon, and that they be granted a new trial of this cause,
14 and for all other and proper relief.

W. R. DONHAM,
Attorney for Defendants.

Filed Jan. 31st, 1919. R. R. Chamberlain, Clerk.

15 In the Hot Springs Circuit Court, January 31st, 1919.

No. 1494.

H. A. F. AULT, Plaintiff,

vs.

MO. PAC. R. R. CO., and WALKER D. HINES, Director General of
Railroads, Defendants.

(Motion for New Trial Filed.)

This day comes the defendants by W. R. Donham, Esqr., their attorney, and presents to the Court their motion for a new trial this day filed herein.

The Court being well and sufficiently advised as to all matters of law and fact arising herein, doth overrule said motion for a new trial, and to which action of the Court in overruling said motion for a new trial, the defendants at the time excepted and had their exceptions noted of record.

Whereupon defendants prayed an appeal to the Supreme Court of Arkansas, which was granted, and defendants asked and are

given 60 days from and after this date within which to prepare tender and file their Bill of Exceptions herein.

16 In the Hot Springs Circuit Court.

H. A. F. AULT, Plaintiff,

vs.

MISSOURI PACIFIC RAILROAD COMPANY et al., Defendants.

Bill of Exceptions.

Be it remembered, That on the 29th day of January, 1919, this cause came on to be heard before the Honorable John Ross, Judge, presiding, of the Hot Springs County Circuit Court, and both parties announcing ready for trial, a jury was duly empaneled to try the issues of fact arising herein, whereupon the following evidence was introduced, objections saved, exceptions and proceedings had, to wit:

Appearances:

J. M. Smith and D. D. Glover, Esquires, for Plaintiff.

W. R. Donham, Esquire, for Defendants.

Shepherd, Reporter.

17 The Plaintiff, to sustain the issues upon his behalf, thereupon introduced the following testimony, to wit:

H. A. F. AULT, being first duly sworn, testified as follows:

Direct examination.

(Mr. Glover:)

Q. Please state your name to the jury?

A. H. A. F. Ault.

Q. You are the plaintiff in this suit, are you, Mr. Ault?

A. Yes, sir.

Q. You allege in your complaint that in July, I believe it was, in 1918, that you were in the employ of the Missouri Pacific Railroad Company?

A. Yes, sir.

Q. Is that true?

A. Yes, sir; that is true.

Q. Who employed you?

A. W. W. Jones.

Q. How long did you work there?

A. Twenty-one days.

Q. Mr. Ault, Mr. Jones, I believe, was the agent of the defendant here at that time?

A. Yes, sir.

Q. Was it his custom and did he employ all the men, all the men were employed by him and discharged by him?

A. I am told that is true, yes, sir.

18 Q. By the agent.

A. Yes, sir.

Q. I will ask you to speak a little louder?

A. W. W. Jones told me that he employed the men and I went to work under his contract.

Q. You made a contract with Mr. W. W. Jones, the agent of the Missouri Pacific Railroad Company, at that time here at Malvern?

A. Yes, sir.

Q. What did Mr. Jones, under his contract for the Missouri Pacific Railroad Company, what did he agree to pay you per day or per hour for your work?

A. Twenty-five cents an hour or 10 hours, \$2.50.

Q. Under that contract how long did you work?

A. Twenty-one days.

Q. And how many hours per day?

A. It would average from eight to eleven hours a day.

Q. From eight to eleven hours a day?

A. Yes, sir.

Q. What did your time at your contract price amount to at the time you were discharged or refused further employment?

A. Fifty dollars.

Q. Fifty dollars, that is the amount you have sued for?

A. Yes, sir.

Q. Now was Mr. Jones the agent there at the time that you were discharged?

19 A. The papers were addressed to him, that was, as being the agent.

Q. Well, was he there as being the agent, or was some one else there?

A. He was there as agent.

Q. I mean at the time you were discharged was he there all the time?

A. He was only there one week, the best I recollect.

Q. Who was acting as agent?

A. Mr. E. B. Williams.

Q. Is he now the agent there and had he acted there since as agent for the Missouri Pacific Railroad Company?

A. Yes, sir.

Q. If he discharged you just tell the jury when it was that he discharged you?

Mr. Donham: Just a moment. We object to that line of questioning.

By the Court: The objection is that it is leading.

Q. Were you discharged or refused further employment under that contract?

A. I presumed so, he put a man to work in my place anyway.

Q. Well, did he tell you that he was refusing you further employment?

A. Yes, sir. I had a man to work on Sundays for me.

Mr. Donham: I object. He ought not to ask him, "did he tell you so and so."

Court: I will overrule your objection.

Mr. Donham: Save our exceptions.

20 Q. Then state whether or not you were discharged or refused further employment at the rate of twenty-five cents an hour by Mr. E. B. Williams. State it to the jury.

A. I was at work, as I told you before—he says as a porter, but I was working as baggage agent, as I understood it, and carrying the mail, and Mr. Williams, I went down to investigate the matter and he was the head agent and he had changed it until I was to work part of the night and part of the day. Mr. Reynolds was there and he told me that Mr. Williams was working me at \$1.50 a day, and I could not support my family on that and I went down for an investigation on Saturday afternoon and Mr. Williams gets the record and he goes to "porter" and he says, "You are the porter," and I said that I don't understand that I am employed as porter, but he said, "We are paying the porter \$45.00 per month." I asked Mr. Williams how I might gather the information in regard to my employment; that I was not employed as a porter under no consideration, I was employed at twenty-five cents an hour, so Mr. Williams just said that he was sorry it occurred, but he could not mend it. I just said to him—at first I said, "Mr. Williams," I said, "I cannot support my family at that figure, I turned down a job at \$2.50 a day for this, and therefore I am expecting it just according to the contract." Well, he said, "I cannot do that." I said, "That is up to you." He said, "I am working according to orders,

21 and whenever I get other orders, all right, but the money is on hand for you and if you want it, all right, and if you don't all right." I said, "Why then you can have the job." So, Sunday, I had a man employed to do the work on Sunday. I don't work any time on Sunday, and paid a man out of my own pocket to do the work on Sunday, and on Sunday I had the man paid, as I have just stated. He sent a man, sent him up Saturday evening and I refused for him to go to work until I called Mr. Harris, because he is the oldest man under W. W. Jones, as I understand it, and I asked him for information, Williams was going to stop a man from work. I told him it was my job, the way I understood it, and until I was paid for it I would not let him go to work until I got the money. He said, "You can not do that, Mr. Williams is here doing business for the Railroad Company," and he said, "I would advise you not to do it." I said, "I am ready to go back to work, I haven't refused to work at any time, but the money is what I am looking for, and if he expects to consider this as a discharge, all right." He advised with me not to refuse to let the man go to work, and, of course I taken his advice, and I then demanded of Mr. Williams my money, and he said it would be here in several days, and I was in bed sick, not able to go to the office, and my father was here, and I authorized him to go and sign anything legal pertaining to my money, didn't say anything about no definite sum, just ask them for my wages as a support to my family. My father went and he refused to

let him have the money. He claimed that the first week's check was made in Adams name. Whether he was keeping the books or the other fellow, I will not state, but, nevertheless, he said, "If you want that check I will turn it over to you," and my father came back and told me about it. I telephoned then to Mr. Williams. I told him I wanted my money, and Mr. Williams has never made any offer whatever to pay me my money. I sent my wife with a written order and he refused to pay it. I went to his office and he just turned and showed me the check, and he said, "Mr. Reynolds is gone." And I said, "If you will hand me the check and endorse it as the agent of the Railroad Company, as the freight agent here, I will get it cashed at the bank or should I fail to then it is my loss."

Q. Mr. Williams, the agent of the Missouri Pacific Railroad Company, sent a man to take your place, and did he take your place?

A. Yes, he did. Yes, sir, indeed.

Q. And he refused to continue you at the rate of \$2.50 a day?

A. Yes, sir.

Q. And that is the contract you had with Mr. Jones, the agent before him?

A. Yes, sir.

Q. Have they ever paid you a cent, Mr. Ault, on your wages?

A. Not a penny. Never offered to pay.

23 Q. You made your demand of them to have your money there did you?

A. Yes, sir.

Q. How many days after you made your demand for your money to be sent to the agent here at Malvern, how many days before you called, if you called for your money or check, or did you send your father the first time?

Q. How is that?

Q. How many days was it after you say you were discharged or refused further employment at the contract you had with it, after you had made demand for your check to be here, how long was it before you sent your father down there to get your check?

A. I was discharged, the way I considered it, on Sunday, that the other fellow was there, but I sent my father over on the following Saturday.

Q. On the coming Saturday. You went yourself in person after that and demanded it.

A. Yes, sir.

Q. They never did give you any money then, did they?

A. No, sir.

Q. Nor offered you any check?

A. Yes, sir.

Q. Did they refuse to pay you the money?

A. Yes, sir.

Q. Then I believe you stated you sent your wife with an order for it?

24 A. Yes, sir.

Q. And they refused to pay her?

A. Yes, sir.

Q. Then you said—I don't know whether you stated it or not, but did you give to me and Mr. Smith as your counsel at that time an order for your money?

A. For Fifty dollars.

Q. Did you know of your own personal knowledge whether that was presented or not?

A. No, sir.

Q. You said at the time you were refused further employment that they owed you Fifty dollars?

A. Yes, sir.

Q. You had kept your time; you have got your time?

A. Yes, sir.

Q. It was twenty-five cents an hour, and it figures even Fifty dollars?

A. Yes, sir.

Cross-examination.

(Mr. Donham:)

Q. When did you begin work, Mr. Ault?

A. The 8th day of July.

Q. 1918?

A. Yes, sir.

Q. When did you cease work?

A. Twenty-one days following.

Q. What day of the month would that be?

A. I have it on the calendar. I judge it to be the 29th.

25 Q. The 29th day of July?

A. I would think so.

Q. Do you know what day of the week that was, the 29th day of July?

A. I do not. I could tell, though.

Q. What day of the week did you cease to work?

A. I believe I can tell you in a moment.

Q. Well, all right, tell me.

A. The day that I considered I was discharged was the 28th, on Sunday. The 29th was when I would have gone back to work if he would have let me.

Q. So you ceased your work then not on the 29th but on the 28th, which was Sunday?

A. Yes, sir.

Q. The duties of the position required you to work on Sunday, did they not?

A. I was told so when I began.

Q. You understood that when you took the employment?

A. Yes, sir; and I made arrangements with a man to do the Sunday's work.

Q. You never did do any Sunday work yourself?

A. Not a bit.

Q. You refused to do that?

A. Yes, sir.

Q. You did that because you are a minister and felt like you ought not to work on Sunday?

A. Certainly.

26 Q. How many Sundays were in there? I presume we could count that up. Do you remember how many Sundays were in there during that period?

A. We can get a calendar and see how many.

Q. All right. We can get a calendar and see. You say you began on the 8th?

A. On the 8th. The last Sunday included was three, the 14th, 21st and 28th.

Q. So that on all of those three days you refused to perform any labor yourself?

A. I just paid for the work, yes, sir.

Q. In other words, you claim the right to substitute somebody in your place, and send somebody else?

A. Yes, sir; he said that was all right.

Q. Well, whether he said that was all right or not that is what you did?

A. Sure.

Q. With whom did you have your contract of employment?

A. W. W. Jones.

Q. Was there anybody present except you and Mr. Jones?

A. My wife was present, is all.

Q. Where was the contract made?

A. At my home up the other side of the Methodist Church here, the first house the other side of the Methodist Church.

Q. You met him there, did you?

27 A. No, sir. He took dinner with me on the Sunday before. I was to work on Monday.

Q. Just please state again the terms of that contract?

A. Mr. W. W. Jones told me that if I would go to work for him, that he was needing a hand and he would give me a job at twenty-five cents an hour, or \$2.50 for ten hours, and I was intending to go to work at that time for a man at Moline, which afterwards I was employed by him.

Q. Well I don't care anything about the Moline job.

A. I accepted his contract and I went to work for W. W. Jones.

Q. Did you have a pay day in there, or not?

A. No, sir.

Q. While you were working for him?

A. No, sir.

Q. Now then the day before you say your man was laid off, did you not, in the presence of E. C. Reynolds, the cashier at the freight house, make the statement that you could not work any more because the duties required your working on Sunday and you could not do it?

A. I did not.

Q. Did you know a man there by the name of Mr. Young, who was working as clerk in the freight office?

A. Mr. Young? I know Miss Young.

Q. Well, Miss Peggy Young?

A. That is the lady that sits across the table, yes, sir.

28 Q. Now, did you not, in the presence of Miss Peggy Young, the young lady that has just gone out of here, as well as in the presence of Mr. E. C. Reynolds, and also in the presence of E. B. Williams, who was the agent you say, make the statement that you did not care to work any longer because your duties required you to work Sundays, and on account of being a Methodist preacher, or a preacher, that you refused to do it?

A. No, sir, I did not make that statement at all.

Q. Do you know Mr. W. D. Harris?

A. I don't know his initials. I know Mr. Harris.

Q. Who was working there at the freight office?

A. Yes, sir.

Q. Did not you state to him or in his presence that you could not work because of your job requiring you to work on Sundays and you would not do it?

A. No, sir.

Q. That is all.

Redirect examination.

(Mr. Glover:)

Q. I believe you stated that when you entered the contract with Jones it was understood you would not work on Sundays but that you would furnish a man?

A. That was the understanding with Mr. Williams and myself and Mr. Hanley, I had made that arrangement.

Q. To furnish a man to take your place, to take your place on the Sabbath day when you would not work and you paid for that man out of your own pocket?

29 A. Yes, sir.

Q. The railroad company did not pay him to work, did it?

A. No, sir; not a penny.

Q. He was accepted by them to work on that day?

A. Yes, sir.

Q. They have never paid you that back, have they?

A. No, sir; not a penny.

Q. That is all.

Recross-examination.

(Mr. Donham:)

Q. There is a further question, Mr. Ault. When you were sending down there demanding your pay, what amount were you demanding?

A. I never made any definite amount, with the exception of the attorneys, when they made a definite demand for the money. I just sent for my money, that was all.

Q. What amount was that?

A. Fifty dollars.

Q. That is what you were demanding or wanted?

A. Yes, sir; that is the contract.

Q. Then that was the amount that you were sending there for and they offered to pay you \$31.20, didn't they?

A. Never did offer to pay me a nickel.

Q. They offered to pay your attorneys, didn't they?

A. Some two or three weeks later they may have.

Q. I am not asking you about the time. As a matter of fact, that offer was made, or do you know about it?

30 A. I didn't know of it for some two or three months.

Q. You didn't know of that offer that was made to your attorneys for some two or three months?

A. No, sir.

Q. That is all.

Witness excused.

Noon recess.

31 Afternoon Session, 1:30 p. m.

H. A. F. AULT, being recalled for further direct examination, testified as follows:

Direct examination.

(Mr. Glover:)

Q. You stated in your testimony before noon something about having sent your wife down there to make some date with Mr. Williams, I wish you would restate that and see if I get it clearly in my mind?

A. I sent my wife down Saturday morning, the same morning, Saturday, as I mentioned before to collect my wages with the written order. I beg your pardon, I didn't send her with a written order but I gave her authority to get my money. Mr. Williams said he could not accept that kind of a condition but he would bring Mr. Reynolds and come out at 2:30 that afternoon of the same day and would settle that with me and then I could sign up a certain thing that he had to sign up. He did not come and she called him and he said he could not come then and my father went later.

Q. At the time you spoke about you and your wife going to his office there at night, when was that?

A. That was two weeks following the time that my father had appeared at the office.

Q. Did you and your wife see him there at his office that night?

32 A. Yes, sir; according to his orders.

Q. What did he say to you there about it?

A. He said Mr. Reynolds was gone and he had made arrangements with Mr. Reynolds to go home at five and he came back at six, and we agreed we would not be at his office later than 6:15.

Q. How long was that after he told you he could not use you?

A. Three weeks.

Q. What evening was it he told you he could not use you any further?

A. On Saturday evening, the 28th, I believe is the way I stated it.

Q. Just state to the jury what his exact words were with reference to not using you any further?

A. When he examined the record first he claimed the record said that they only paid a porter \$45.00 per month and that is all he could give and he could not use me at that figure, was all he said. Of course, I told him when he paid me I was willing to let the other man take charge of the job and not before, so he sent a man that same afternoon to take my place and I refused to let him go to work on Sunday and I not being there the other fellow gave away and let him go to work.

Q. He told you he could not use you any further at \$2.50 a day?

33 A. \$2.50 a day, yes, sir.

Cross-examination.

(Mr. Donham:)

Q. Do you recall the conversation that Mr. Harris had on the next day, Sunday?

A. Yes, sir.

Q. Did not you call Mr. Harris up and tell him that you had reconsidered the matter and that you believed you would go back to work?

A. No, sir. I just called Mr. Harris and asked him for information, him being the oldest man in the house. I told him I was a man that wanted to do the right and square thing and my father had learned that he was going to put a man on any way, I didn't know that myself because I was at home and had been to church, and the next day he had a man paid to be there and my father found it out, that he was going to put a man on anyway; and he made this report to me and I told him I would not let the man go to work. That I was going to hold the job. I just thought it might be best for me to call Mr. Harris because I wanted to do it on the right kind of a business deal. I called him and asked him if Mr. Williams had telephoned and he said he did not, so I just asked him about the matter. I said, "Now he was replacing, or in other words, he sent a man in my place and refused for me to go to work and he hasn't given

34 me any reason whatever to put him in my place except he didn't want to pay \$2.50 per day. I am not willing now to go and work for him this afternoon, Mr. Harris, you are a man of age and competent to give advice and I just ask your advice on this," and he said, "I will tell you, Brother Ault, to be on the safe side of the work you had better not refuse to let him go to work." That is my best recollection about that conversation.

Q. Didn't you tell him that you had reconsidered the matter and believed you would go back to work provided arrangements could be made for somebody to take the Sunday work, that you would not do that on account of the fact that you did not believe it right to work on Sunday?

A. There never was anything said in regard to Sunday work, at all, with the exception of agreeing for the men to do the work on Sunday.

Q. Who did you have that conversation with?

A. Mr. Hanley.

Q. Who is Mr. Hanley?

A. Mr. Hanley is a man employed by the company down there.

Q. What did Mr. Hanley do?

A. He is working as the baggage man in the day time, that is, part of the time, and part of the night.

Q. In other words, he was doing the same character of work that you were doing?

35 A. Practically the same thing.

Q. You didn't have any agreement with them that had authority to make agreements with you, did you?

A. How is that?

Q. Mr. Hanley?

A. No, sir; he went to see Mr. Williams and made arrangements, and Mr. Williams, he and myself got together on the price and he did the work.

Q. You didn't see Mr. Williams, then, it was Mr. Hanley?

A. Mr. Hanley saw him for me as I understand, he was the head agent, or in other words he had been employed longer on the railroad, which had the favor.

Q. That is all.

Redirect examination.

(Mr. Glover:)

Q. When you put a man on you paid him yourself?

A. Yes, sir.

Q. The railroad company didn't do that?

A. No, sir.

Q. You made out the full time?

A. Yes, sir.

Witness excused.

36 W. W. JONES, having first been duly sworn, testified as follows:

Direct examination.

(Mr. Glover:)

Q. Your name is W. W. Jones?

A. Yes, sir.

Q. Where were you and for w-om were you working in July, 1918?

A. The Missouri Pacific Railroad Company up until July 10.

Q. Were you working here at Malvern, at that time?

A. Yes, sir.

Q. Working for the Missouri Pacific Railroad Company?

A. Yes, sir.

Q. What position did you hold with them there?

A. Railroad agent.

Q. Railroad agent?

A. Yes, sir.

Q. Did you have Mr. Ault in your employ at that time?

A. Yes, sir.

Q. What were you paying him per day, Mr. Jones, under your contract with him?

A. I agreed to pay him twenty-five cents an hour at that time, trucking freight was usually worked about ten hours in a day.

Q. That would be \$2.50 a day then would it?

A. Yes, sir.

37 Q. Do you know of your own personal knowledge how much is due him down there for labor?

A. No, sir; only what time he worked for me about four days, three or four days.

Q. You were called into the war service at that time?

A. Yes, sir.

Q. So you did not stay any longer than that time?

A. No, sir.

Q. But you had him employed at twenty-five cents an hour, \$2.50 a day?

A. Twenty-five cents. Of course, we had no authority to make a stated salary. We had to carry him on the extra report. We had to carry him on the extra labor roll. If he worked ten hours a day, that would be \$2.50. He worked ten hours a day while I was there. If he worked eight hours, he got paid for eight hours.

Q. But that was supposed to be worked for ten hours a day?

A. We had that much work, yes, sir.

Q. And he worked that much time while you were there?

A. Yes, sir.

Cross-examination.

(Mr. Donham:)

Q. You say that three or four days after he went to work that you went away and entered the army service?

A. Yes, sir.

38 Q. Mr. Williams took your place?

A. Yes, sir.

Q. What is the salary of the baggage man?

A. At that time it was \$45.00 per month.

Q. Which is \$1.50 a day.

A. Yes, sir.

Q. For that extra dollar, how did you arrange that?

A. The extra dollar for what?

Q. You were to give him 25 cents an hour?

A. I had a baggage man in addition. I had a baggage man on

the pay roll at that time when I was there. I did not hire him as a baggage man.

Q. Well, did he work as a baggage man while you were there?

A. No, sir.

Q. What did you hire him for?

A. Trucking freight.

Q. Did he not truck freight and unload baggage after that?

A. We used him in different capacities, and I carried him as a freight trucker.

Q. You carried him along as a freight trucker?

A. Yes. He might have handled some mail. We needed a man to handle some mail. The other man might have gone somewhere, and he might have handled some mail. I don't recall.

Q. Did you carry him at a salary of \$2.50 on the extra roll?

39 A. Yes, sir.

Q. But the salary of baggage man was \$35.00 a month?

A. Yes, sir.

Q. That is all.

Redirect examination.

(Mr. Glover:)

Q. He was handling baggage?

A. Yes, sir. We had him to do anything that was necessary.

Q. He was an extra man put on there at \$2.50 a day because you had so much work one could not do it all?

A. That was his main occupation. But he was working around there and checking freight and working in the freight office.

Q. Just doing anything that you commanded him to do, wasn't it?

A. Yes, sir.

Q. That is all.

Witness excused.

40 HOMER AULT, having first been duly sworn, testified as follows:

Direct examination.

(Mr. Glover:)

Q. What is your name?

A. Homer Ault.

Q. Are you the father of the plaintiff here, Mr. Ault?

A. Yes, sir.

Q. Do you remember the occasion of him being in the services of the Missouri Pacific Railroad Company in July, 1918?

A. Yes, sir. As far as me knowing anything about the date, I don't know.

Q. But he was working there?

A. Yes, sir. I know he worked there, yes, sir.

Q. I will ask you if after the time he quit work, or was discharged there, whichever it was, when he was at home was he in bed, sick, or not?

A. Yes, sir.

Q. State whether or not during that time you visited him there at his home?

A. Yes, sir. I visited him there at his home?

Q. State whether or not at his request you went to the Missouri Pacific Railroad Company's agent here at Malvern at his request and demanded his check or money for his services there?

A. Yes, sir; I did. I did, yes, sir.

Q. Did they pay you?

41 A. No, sir; they did not.

Q. What did they say about it?

A. When I first named it to Mr. Williams I just went down there and told Mr. Williams my son was sick and I had come after his money. That is what I told him.

Q. You told him you had come after his money?

A. Yes, sir.

Q. Did you state to him how much?

A. No, sir. I never stated nothing about the amount. I just told him I had come after his pay, I believe, is the way I spoke it.

Q. What did he say to you about it?

A. Well, Mr. Williams first said there was a check, if the boy was amind to take it, made out in Adams' name.

Q. In the name of Adams?

A. Adams; yes, sir. Of course I was standing there waiting to see what he was going to do. I just called for the money and was waiting his notion on it, but he didn't give me no check and he didn't offer me any.

Q. But you went down there and demanded it?

A. After he didn't offer no check, I just says to Mr. Williams this: "Well, the boy is sick, and stands in need of his money, and I would like to get it, I understood that if I would come I could get it." I made myself acquainted with Mr. Williams and informed him that I was his father, the boy's father, and that I had come after the money.

12 Q. You told him you were the father of the boy that was sick and wanted the money?

A. Yes, sir. And I wanted his money for him. And I told Mr. Williams, I said, "Now the boy stands in need of the money." And Mr. Williams says, "I will do this;" you all understand this now. "I will do this, if he is not up by Monday," that was Saturday at dinner, the 3rd day of August, Saturday afternoon. Mr. Williams said, "if he is not up by Monday by noon, I will take Mr. Reynolds," anyhow the cashier, I think that is his name, "and the books and go up there Monday at noon and settle up with him." That is all I know about the case.

Q. That is all you know about the case?

A. Yes, sir.

No cross-examination.

Witness excused.

Plaintiff rests.

43 The Defendant, to sustain the issues upon its behalf, there-upon introduced the following testimony, to wit:

E. B. WILLIAMS, being first duly sworn, testified as follows:

Direct examination.

(Mr. Donham:)

Q. Your name is E. B. Williams?

A. Yes, sir.

Q. What is your occupation?

A. I serve as agent of the Missouri Pacific and Rock Island.

Q. How long have you been working in that capacity?

A. Since July last year.

Q. Who did you succeed as agent?

A. Mr. W. W. Jones.

Q. The young gentleman with soldier clothes on, who has just testified?

A. Yes, sir.

Q. When you took your position as agent here at Malvern, was the plaintiff, Mr. H. A. F. Ault, working there?

A. Yes, sir.

Q. What work did he do during the time that you were there and before he ceased work?

A. Well, he filled the position as late afternoon baggage man while he worked for me.

Q. As baggage man?

44 A. Yes, sir; and porter.

Q. Baggage man and porter?

A. Yes, sir.

Q. What is the salary of that position?

A. \$45.00, was at that time.

Q. \$45.00 per month?

A. Yes, sir; \$45.00 per month.

Q. How did Mr. Ault happen to cease his employment?

A. Well, on or about the 27th, or on Saturday about the last Saturday in July, he came to be in the afternoon sometime and told me that he could not work any longer on account of having to work on Sunday. He said in his position it would not do for him to work on Sunday, and he said he would give me until Monday to get another man in his place. Of course, I told him that the position would bear a man on Sunday if that is the way he wanted to put it, I could get a man, as well as I recollect, and I employed a man the following day to take his place.

Q. You never then, at any time, discharged him?

A. No, sir.

Mr. Glover: We object to him leading the witness.

Mr. Donham: That isn't leading.

Q. Well did you, or did you not, discharge Mr. Ault?

A. No, sir.

45 Q. You just stated how he ceased his employment?

A. Yes, sir.

Q. Did he ever have any arrangement with you, Mr. Williams, by which he was permitted to substitute a man for the Sunday work?

A. Not without he could make it with his other baggage man up there. I expect, and I am told, that at times when he would want to get off on Sunday, he could switch off with the other man, and it was all right with me, but I never made any arrangement where he could be off all day Sunday.

Q. How many baggage men were working there?

A. Two.

Q. And you say that unless he made arrangements with the other baggage man to take his place that there was no such arrangement between you?

A. No, sir.

Q. Do you recall that Mr. Ault ever spoke to you about substituting a man or not?

A. No, sir; I do not.

Q. If he substituted some outside man that was not employed by the company there at all, did he do that of his own accord, or did he do it with your permission?

A. He did not do it with my permission, because I generally had to know who was to carry the mail and be responsible for it.

46 Q. Would you have permitted some stranger that you did not know about, that was selected by one of your employees, say a baggage man, in his position, to come into there and handle the bills and do the baggage work?

A. No, sir. The only arrangement I could have permitted him to have made would be with the day baggage man, that is, for him to do his work, so they could switch up when either one of them wanted to be off.

Q. In other words, as between the two it was immaterial to you which worked at it and which worked at day and which worked at night?

A. Yes, sir; it didn't make any difference.

Q. But as to the introduction of an outside men and strangers, did you or not ever have any arrangement with either of them that that might be done?

A. No, sir; I did not. I have always told the two baggage men, and they have always asked of me when they would want off on Sunday, and they would substitute for the other man in their place. In other words, I always allowed that. But I never did have any arrangement that I know of where they could employ an outsider.

Q. Well, would you have permitted such an arrangement as that; to employ an outsider that might be selected by either one of them?

A. No, sir. Not by somebody else. Not without it was some one I knew was familiar with the work, at least, or knew how to handle that work.

Q. That is all.

47 Cross-examination.

(Mr. Glover:)

Q. You are the agent down there now aren't you?

A. Yes, sir.

Q. You handle the books there don't you?

A. Yes, sir.

Q. The trouble you had with this man was about the amount that you were to pay him, wasn't it?

A. Well, I did not have any trouble about the amount.

Q. Well, didn't you refuse to pay him?

A. No, sir.

Q. What did you offer to pay him?

A. I paid him what the position paid.

Q. Well, didn't you have the books before you?

A. Yes, sir.

Q. Don't you know that your books show you owed him \$2.50 a day, or twenty-five cents an hour?

A. No, sir.

Q. Didn't you keep any time record?

A. Yes, sir.

Q. Who keeps the time roll?

A. I do.

Q. And you know now that he was paid, was being paid \$2.50 a day?

A. No, sir.

Q. You refused to pay him \$2.50 a day, didn't you?

A. Yes, sir.

48 Q. And that is the reason you let him out, wasn't it?

A. No, sir.

Q. Didn't you tell him on Saturday evening that you could not use him any further on \$2.50 a day, and if he was going to make a contention for \$2.50 a day you could not use him any further?

A. I don't remember anything like that.

Q. You don't remember. Do you tell this jury that you did not tell him that you would put a man in his place?

A. This man told me in the position he was occupying he could not afford to work on Sunday.

Q. He never did work there on Sunday, did he?

A. I don't know whether he did or not.

Q. Don't you know that he was a man that did not think it was right to work on the Sabbath day, and he put a man in his place and paid him that himself?

A. He told me that he could not continue to work on Sunday.

Q. You did not pay this man extra to work extra on Sunday, did you?

A. No, sir.

Q. The railroad company did not pay them?

A. No, sir.

Q. If anybody paid him at all it was Mr. Ault?

A. I guess so.

Q. You did not handle anything there except mail and things of that kind; you don't work a man in the office down there, on Sunday?

49 A. No, sir.

Q. Sunday is supposed to be a day you handle nothing but passenger traffic?

A. Yes, sir.

Q. And you did not need a man there?

A. We needed a man there to handle the baggage.

Q. What for?

A. To do the work there.

Q. That was just trunks and things like that that come in there?

A. Yes, sir.

Q. Now did not you know and don't you know that he was substituting *there* a man there, and it was perfectly satisfactory for him to be there, perfectly satisfactory with everybody, and there had never been a complaint about him having a man in his place?

A. If he substituted anyone there to handle this work, Robert Hanley did his work down there.

Q. He was working there then, wasn't he?

A. Yes, sir.

Q. Robert Hanley is in your employ?

A. Yes, sir.

Q. And if he substituted Robert Hanley, which he avers he did, that is all right?

A. Yes, sir; if he made arrangements and paid Hanley that was all right to swap work.

Q. Hanley swore he filled his place on Sunday?

50 A. Yes, sir.

Q. He just got in the extra time, that much extra time?

A. Yes, sir.

Q. That was Hanley, that was his regular business, wasn't it?

A. Yes, sir.

Q. That was perfectly all right, then, with you if he wanted to handle it?

A. If he wanted to switch?

Q. That is what he says he did do, he got Hanley to handle it for him on Sunday because he would not get anybody else and you had no complaint on that, and it would not have made any difference if Hanley had handled it that way for ten years, would it?

A. Well, now, if he was going to make a regular thing of it, I couldn't say about that.

Q. Didn't you tell the jury awhile ago that you told him if he could get the other man to take his place on Sunday why it would be perfectly all right with you?

A. What I said is this, whenever they wanted to change and when one of them wanted off on Sunday, on any special occasion, if he could get the other man to take his place why it would be all right with him.

Q. Yes, sir; and you had Mr. Hanley in your employ in that capacity, didn't you?

A. Yes, sir.

Q. And he is there now doing the same kind of work, isn't he?

51 A. Yes, sir.

Q. And he served in his place and that was perfectly all right with the railroad company?

A. Yes, sir.

Q. Tell the jury why it was that you wanted to put him out on account of the Sunday work?

A. I did not.

Q. Tell the jury why it was you wanted to let him out on account of the Sunday work?

A. I did not let him out. He told me that he was going to quit and that he would give me time to get a man in his place, because he could not work on Sundays.

Q. Didn't you refuse to let him work there any more, or any longer, at \$2.50 per day, after he told you that that was his contract?

A. I don't remember anything about \$2.50 a day, I don't remember that that was ever mentioned.

Q. You mean to say that you never heard anything about that?

A. No, not until something came up about his check, when he came and called for his time.

Q. What were you paying Hanley?

A. Well, I don't know, I don't know exactly what we were paying him then. I think, possibly, we were paying him about \$55.00 per month.

Q. I thought you said that you could not pay but \$45.00 per month.

52 A. Well, I would like to explain that.

Q. No, just answer my question. I wish to ask you this question?

A. Well, I would like to explain it. I said in speaking of the two positions there, that one paid about \$55.00, the late afternoon baggage position paid \$45.00.

Q. That was not what I asked you. I asked you what you were paying Hanley at that time?

A. I suppose \$55.00.

Q. You suppose?

A. Yes, sir.

Q. Don't you know?

A. No, sir; not for sure.

Q. Don't you know that you were paying Hanley at that time \$2.50 a day.

A. I don't know that.

Q. Don't you know that as a matter of fact?

A. Well, it might figure right close around that.

Q. How would it figure that if you wasn't paying it? What is it you are paying him now?

A. Paying him \$87.50.

Q. Didn't he work for twenty-five cents an hour when he was working?

A. You mean when he worked before?

Q. I mean at the time Ault worked there, at the same time?

A. He did not work on an hourly basis.

Q. He didn't?

A. No, sir.

53 Q. You refused to pay him \$50.00, didn't you?

A. Yes, sir.

Q. Do you remember my coming down there and presenting you with an order?

A. Yes, sir.

Q. I wish you would read that to the jury?

A. (Reading) "Dear Sir: Please deliver my——"

Q. Read the date of it, the whole thing?

A. "August 10th Malvern, Arkansas. Missouri Pacific Railroad Company. Mr. E. B. Williams, Agent. Dear Sir: Please deliver my check, or my money, for my labor performed, amounting to \$50.00, to D. D. Glover and J. M. Smith, my attorneys, and oblige."

Q. Who is it signed by?

A. H. A. F. Ault.

Q. That is the same man that is suing here?

A. Yes, sir.

Q. He is the plaintiff in this case?

A. Yes, sir.

Q. And you refused to pay that, didn't you?

A. Yes, sir.

Mr. Glover: I want to introduce this in evidence and let it be marked exhibit "A" to his testimony.

(The same is above read into the record.)

Q. How much did you owe Mr. Ault that you spoke of?

A. I believe it was \$31.20.

54 Q. That is all you owed him?

A. Yes, sir.

Q. You know now, that that is all you owed him?

A. Yes, sir; according to the position occupied and the time he worked.

Q. And that is all you tendered in the court below?

A. Yes, sir.

Q. Did you make that tender yourself?

A. Yes, sir.

Q. Your attorney was there, wasn't he?

A. Yes, sir.

Q. You never did tender him any more than that?

A. I didn't, no, sir; myself.

Q. Mr. Henry Berger was your attorney in the lower court?

A. Yes, sir.

Q. Didn't Mr. Ault make repeated demands on you for his money?

A. I remember him calling up and requesting me to bring it out.

Q. Didn't he send his wife down there and didn't she request you to pay her the money for him?

A. I don't remember about his wife. I remember about his father coming down.

Q. Don't you remember his wife came down there and told you that her husband was sick and that they needed the money and that they wanted it up there to buy food with, and didn't you tell her that you could not do that kind of business?

A. Mr. Reynolds might have.

Q. I am asking you if you didn't do it?

A. I don't recall, I don't recollect about that.

Q. Will you say that you did not do it?

A. I remembere his father coming down.

Q. Don't you remember her coming down there?

A. I remember her calling up.

Q. Don't you remember her coming down there when you said you could not pay him because Mr. Reynolds was out, and didn't she say—didn't she make arrangements with you and say to you that her husband would come down there that night after supper and let you pay it, and didn't they come?

A. It might have been her instead of the father.

Q. I am not asking you about the father. I am going to do that later on. Let's get through with the husband and wife first, and then I will ask you about the father. I asked you this question: If she, the wife of Ault, the plaintiff in this case, if she did not come down there, at his request, when he was sick and not able to come himself; didn't she come down there and ask you to deliver his check to her because they needed it to buy food with, and didn't you refuse to do it?

A. I think she came and asked Mr. Reynolds. I don't remember of her ever asking me.

Q. I am not asking you if she ever asked anybody else; but I am asking you if she ever asked you?

A. No, sir; I don't think she did.

Q. I will ask you if she didn't make arrangements with you to meet you at your office, the railroad company's office down there, that night after supper?

A. They made arrangements some way. I don't know whether it was with Mr. Ault or her.

Q. Well, that was her, I guess, wasn't it?

A. That he would be there about 6:15 one afternoon, Mr. Ault came along there about 6:05.

Q. Didn't his wife come there with the little baby?

A. No, sir; I don't remember it.

Q. You don't remember that?

A. No, sir; I don't remember that.

Q. He came, though, didn't he?

A. Yes, sir.

Q. He came and demanded his money about 6:05. How long was that after you put that other man in his place?

A. Some ten or fifteen days.

Q. Then he did come down there and demanded it?

A. Yes, sir.

Q. You didn't pay them there either, did you?

A. Yes, sir.

Q. You had his check there?

A. Yes, sir.

57 Q. Didn't you have another man's check that you tried to give him?

A. No, sir; I had his check there for his time.

Q. Did you offer it to him?

A. Yes, sir. I didn't offer it to him because it was in the safe and I couldn't get it. It was after closing hours and I requested that if he would wait until about 6:15 that Mr. Reynolds would be there at that time and he could open the safe and get it out for him.

Q. Don't you know that you had the combination to that safe?

A. No, sir.

Q. Do you mean to tell this jury that you are serving there as agent and that you do not know the combination of that safe?

A. That is right; yes, sir.

Q. Well, you did not pay him his money, did you?

A. No, sir.

Q. Did you send it out to him after that?

A. No, sir.

Q. You knew the man was in need of this money, didn't you? Why didn't you send it?

A. Well, he could have waited a few minutes there and received it. He said, "I am tired of fooling with it," and he went away.

Q. I will ask you if he didn't send his father down there to get it?

58 A. Yes, sir.

Q. What did you tell him?

A. I made arrangements with Mr. Ault, his father, I asked him if it would not be all right for him to go and have Mr. Ault sign up.

Q. You knew Mr. Ault was in need of the money at that time, didn't you?

A. He didn't seem to be.

Q. Didn't Mr. Ault, the father of this man that is suing here, didn't he tell you that his son was in bed sick and needed that money?

A. I don't remember.

Q. Do you say he did not say it?

A. I think he was working for a brick plant.

Q. Who was?

A. Mr. Ault. Mr. H. A. F. Ault.

Q. Do you tell the jury that this man was working when his father came down there for his money?

A. I don't know for sure; but it was my understanding that he had gone to work down there for the brick plant, and that he did not have time to come up after his check himself.

Q. Did you ever have a written order sent up there to you, brought up by his wife and signed by Mr. Ault?

A. I don't know, sir; it seems to me like Mr. Ault's father had some order, he or his wife.

Q. I will ask you if his wife didn't bring an order down there to you?

59 A. Well, now, she may have brought one.

Q. I will ask you to look at that and see if it is not a written order from him that his wife brought back down there and told you that he had authorized her to sign everything and get that check?

A. I expect that is the order that she brought for the cash.

Q. I will ask you to read that to the jury there.

A. (Reading) "Malvern, Arkansas: August 8th. Mr. E. B. Williams, Agent of the I. M. R. R. Freight Office. Dear Sir and Manager: Since it is impossible for me to appear at your office for my checks as I am otherwise employed at present. I am, therefore, requesting you to let my wife have them and sign up for me in any form that may become necessary to the safety of the company in my name. Yours respectfully, submitted. (My own signature) H. A. F. Ault."

Q. Did you deliver it on that order?

A. No, sir.

Q. Why didn't you?

A. I don't remember the order myself.

Q. Haven't you seen that order down there?

A. No, sir; I don't remember it.

Q. I want to have that marked Exhibit "B" to your testimony. You remember his father coming down there, don't you?

60 A. Yes, sir.

Q. This is in August. He was let out in July, wasn't he? And this order was a written order?

A. Yes, sir.

Q. That was in the month following the time that he let him out?

A. Yes, sir.

Q. You didn't deliver it on that, did you?

A. No, sir.

Q. If you had his check there when he says in this written order that he is authorizing his wife to sign up for anything that is necessary to release the company from anything, why didn't you deliver it on that, if you had any check there?

A. I don't remember it.

Q. You don't remember it?

A. I was not the cashier.

Q. You had control of this matter, didn't you?

A. Yes, sir.

Q. Why didn't you authorize it done?

A. I might not have been in at that time.

Q. You say you don't know?

A. I don't remember.

Q. You don't remember anything about it?

A. No, sir.

Q. You don't remember anything about it?

A. No, sir.

Q. All you remember is you say that there is only \$31.20
61 due.

A. Yes, sir.

Q. That is all that is due?

A. Yes, sir.

Q. That is the reason you let him out because you would not pay
him \$2.50 a day?

A. No, sir; that is not right.

Q. Why didn't you continue him at his work?

A. He requested me to get a man in his place by Monday.

Q. Who requested you to do that? Do you say he requested you
to do that?

A. Yes, sir; and I got a man and put him to work, and then he
sent me word that he had reconsidered the matter and would come
back, possibly, Sunday.

Q. Well, would you have let him go to work at \$2.50 a day if he
had come back?

A. No, sir.

Q. Why?

A. Because the position didn't pay it.

Q. Now, we are getting down to it. You did let him out then be-
cause you wouldn't pay him \$2.50 a day?

A. No, sir; that is not right.

Q. He was a good man, wasn't he?

A. Yes, sir; he did his work very well.

Q. He did his work as well as anybody else you put in his place?

A. Yes, sir; I suppose.

Q. Then you let him out because you would not give him
\$2.50 a day?

62 A. No, sir; I let him out because he requested me to get a
man in his place.

Redirect examination.

(Mr. Donham:)

Q. Mr. Glover, in his examination of you, uses the expression, "You
let him out," did you let him out or did he quit?

A. Well, he quit of his own accord.

Q. What does the position pay there now that he had?

A. Straight time for ten hours amounts to about \$87.50.

Q. The Government has raised the salaries of the employees re-
cently?

A. Yes, sir; that is what Hanley is getting now.

Q. Do you remember what Hanley's position paid then; I believe you said he received \$55 per month?

A. \$55 per month; yes, sir.

Q. What was the reason of the difference in the salaries of the two positions at that time, or do you remember?

A. No, sir; I do not. I think the \$45 position was just a lately created position, probably hadn't been there over two years.

Q. Who fixes those salaries, do you do that or does someone else higher-up do that for you?

A. I suppose the General Superintendent's office.

Q. You have nothing to do then with the creating of the positions or the fixing of the salaries?

63 A. No, sir.

Q. You knew the salary of that position, baggage man, was \$45 per month, and that is what you were paying him?

A. Yes, sir.

Q. According to that \$31.20 is what you owed him?

A. Yes, sir.

Witness excused.

64 W. D. HARRIS, having been first duly sworn, testified as follows:

Direct examination.

(Mr. Donham:)

Q. Your name is Mr. Harris?

A. Yes, sir.

Q. Mr. Harris, what is your occupation?

A. Yard Clerk, Missouri Pacific Railroad Company.

Q. How long have you been holding that position?

A. A little over two years the last time. I guess about probably eight years before.

Q. Do you know the plaintiff here, Mr. H. A. F. Ault?

A. Yes, sir; I know him.

Q. You say you know him?

A. Yes, sir.

Q. I believe he was working in the position of baggage man along last July for the company here in Malvern?

A. Yes, sir.

Q. Do you remember that?

A. Yes, sir.

Q. Do you know, Mr. Harris, whether he quit the services of the company of his own accord, or whether he was discharged?

A. I heard him tell the agent that he had quit; and that he notified him to get—that he would give him two days for him to get him another man in his place. That was on Saturday and he
65 stated that he would give him until Monday to get him another man to take his place.

Q. He would give him from Saturday until Monday to get another man to take his place?

A. Yes, sir.

Q. What was his objection to the proposition, Mr. Harris?

A. I think it was a salary question.

Q. The Sabbath question?

A. The Sabbath; yes, sir; and salary, too, making two questions.

Q. Two questions?

A. Yes, sir; I don't think the salary suited him either.

Q. You don't think that the salary suited him either?

A. No, sir.

Q. And that the Sabbath question didn't suit him?

A. Yes, sir.

Q. I wish you would tell us just what he said about it as best you can remember?

A. I heard him tell the agent that he could not afford to work any longer and he would give him two days' notice to get a man in his place; that a man of his standing could not afford to work on Sunday and that the work included Sundays, too.

Q. Did he have any conversation with you after that time?

A. Nothing except over the telephone.

Q. State what he said to you over the telephone?

66 A. He called me up on Sunday and he asked me if I would see the agent and see if he could come back. He said he had reconsidered the matter and that he thought he would come back and work on at the same salary if the agent would arrange it so he would not have to work on Sundays because he could not afford to work on Sunday on account of his standing, being a minister, wouldn't permit it.

Q. But that he had decided to come back provided the agent would arrange to get somebody else in his place to work on Sundays?

A. Yes, sir. He told me that on Sunday afternoon. He called me at my home and talked to me over the telephone.

Q. That is all.

Cross-examination.

(Mr. Glover.)

Q. Mr. Harris, you are in the employ of the Railroad Company, aren't you?

A. Yes, sir.

Q. How long have you been working for the Railroad Company?

A. I don't know, something like ten or twelve years, altogether.

Q. This conversation you heard about Monday, that occurred on Saturday?

A. Saturday afternoon, I believe it was.

Q. What did that come up about there, what did the conversation come up about?

A. He claimed he was short in his check, I believe.

67 Q. What did he state that his contract was with them there with reference to his wages?

A. He said that Mr. Jones had promised him \$2.50 a day.

Q. Yes, sir. Do you know of your own personal knowledge that he was working at that time for \$2.50 a day?

A. No, sir; I do not.

Q. You don't know about that?

A. No, sir.

Q. You don't handle that record?

A. No, sir.

Q. Did not Mr. Williams tell him there that he could not use him any longer at \$2.50 a day?

A. He told him that he could not afford to pay him \$2.50 a day, that the work on that job, that the position, the salary on that job, was \$45.00.

Q. And he could not use him any further at \$2.50 per day?

A. He told him that the company did not allow it on that job, that was all.

Q. He told him that he could not pay him \$2.50 a day and that he had a man in his place?

A. No, sir; that isn't the way he said it, but Mr. Ault told him that he would give him until Monday to get a man in his place.

Q. Well, Mr. Ault just said if you are going to pay me on my contract, according to my contract, which is \$2.50 a day—wasn't he contending for that?

A. That is what he said Mr. Jones promised him.

68 Q. The agent there told him that he would not pay him that, didn't he?

A. He would not pay him any more than the salary allowed.

Q. He would not pay him any more than \$45. per month?

A. Yes, sir.

Q. And that he could not use him any further at \$2.50 a day. Well, did he refuse to pay him \$2.50 a day up to that time?

A. I just told you all I know about it, that he couldn't afford to pay it.

Q. Don't you know that you were in there when this happened and you heard Mr. Williams say time after time that he would not pay him \$2.50 a day for the time back of that?

A. I don't know anything about that.

Q. You don't know that is what the trouble is here, that that is what they are disputing about now?

A. I suppose they are.

Q. You suppose they are now. He was contending he was due \$50.00?

A. Yes, sir.

Q. They contend he was due how much?

A. I never figured it. I don't know anything about that.

Q. You say that both the Sabbath and the salary questions were up there?

A. Yes, sir.

69 Q. Mr. Ault never did work there on Sunday, did he?

A. I don't know.

Q. He always put a substitute in his place, didn't he?

A. I could not tell you. I was not up there on the Sabbath.

Q. You don't know whether he worked on the Sabbath or not?

A. I don't know whether he did Sunday or not; no, sir; I didn't know who the man was for quite a while after he had been put in there.

Q. What does the baggage position, what are they paying there for the baggage man now?

A. I think his salary is \$87.50.

Q. \$87.50. That is the same work he wanted Mr. Ault to do for \$45.00, isn't it?

A. No, sir; I don't think so.

Q. What was it he did?

A. I think the regular man he had was *the* carry the mail, clean up in the afternoon and check the freight.

Q. Mr. Williams says he was on there as a baggage man; if he said that then he is mistaken, is he?

A. I don't know how he hired him.

Q. Wasn't he an extra baggage man?

A. I don't know.

Q. You don't know about that?

A. I don't know what they—what contract they had.

Q. As an extra baggage man and freight man?

70 A. I know that he would have to truck freight up there.

Q. Didn't he truck both freight and baggage?

A. No, sir.

Q. Now, you saw him trucking baggage in there and rolling it in there and doing that class of work around there, didn't you?

A. No, sir, I didn't see him up there.

Q. Your work is way down the track from that?

A. My work is at the freight office and all over; sometimes a half mile away.

Q. How often would you be up there at the depo?

A. Probably I would be there at seven o'clock in the morning. And probably I had business back there at one o'clock and probably I was back there at six.

Q. I hand you a calendar for the year 1918. Is that a calendar for the year 1918?

A. Yes, sir; I guess it is.

Mr. Glover: I want to introduce that in order that we might figure the time. I will introduce that as exhibit "C."

(Same here follows.)

71 Redirect examination.

(Mr. Donham:)

Q. Do you know whether the Government has recently raised the salaries of its employees?

A. Yes, sir; we have had two raises since January 1, 1918.

Q. Do you recollect whether this question of salary came up at the time that Mr. Ault told Mr. Williams to get another man b

Monday, or whether it was after that when the check came and it was discovered about the difference in that and the question of salary came up?

A. I think, probably, it was the same day, I am not sure.

Q. You are not sure about that?

A. No, sir; I didn't see the check, but it seems to me like it was the same day. I think our checks came, probably, about the 28th; they generally do.

Q. About the 28th?

A. Yes, sir.

Q. Well, you don't pretend to say that the checks were there at that time?

A. I think that they probably came that morning. I am not sure about that. They might not have been.

Q. But you say that you are sure that the question of salary came up then or that it came up later when the check came, if the check wasn't there at that time?

A. I don't remember.

Q. You do remember that there was some question of salary connected with it; that is, there was some difference between Mr. Williams' figures and his?

A. Yes, sir.

Q. But whether that came up when the check came or whether it came up then is the question you are not sure about?

A. No, sir; I am not sure about it.

Q. That is all.

Recross-examination.

(Mr. Glover.)

Q. But you think that the questions of the Sabbath and salary were both discussed there at the same time, on Saturday?

A. Really I don't know.

Q. Well, wasn't that your first statement, I thought that it was?

A. Well, probably so, but I wasn't paying much attention to it at that time. He was talking to Mr. Williams and I was at my desk, and I wasn't paying much attention to it.

Q. Did you handle the checks there; did you ever see a check there for Mr. Ault at all?

A. No, sir.

Q. You never did see one?

A. Not that I remember.

Q. Do you know whether, as a matter of fact, any check came there; one check came down there for a fellow by the name of Adams and he was trying to get that off on him for a littler amount?

A. No, sir.

Q. You don't know anything about that?

A. No, sir.

Witness excused.

74 E. C. REYNOLDS, having been first duly sworn, testified as follows:

Direct examination.

(Mr. Donham:)

Q. Your name is E. C. Reynolds?

A. Yes, sir.

Q. What is your occupation?

A. Cashier at the freight office.

Q. For the Missouri Pacific Railroad Company?

A. Yes, sir.

Q. Here at Malvern?

A. Yes, sir.

Q. How long have you held that position?

A. Since about September 20th, 1917.

Q. Do you know Mr. H. A. F. Ault, the plaintiff in this case?

A. Yes, sir.

Q. Did you ever work for the company?

A. Yes, sir.

Q. Where?

A. In Malvern here.

Q. In what position?

A. Well, he handled baggage a little, handled freight around the freight office, too.

Q. Do you know how he happened to cease his work for the company, whether he quit or whether he was discharged?

75 A. He quit.

Q. How do you know that?

A. He told Mr. Williams and I, or, told Mr. Williams before me, and I heard it. They were talking before me, that he couldn't hold the job any longer because of the Sunday work, on account of his profession, he couldn't afford to work on Sundays any longer.

Q. Well, did he work any longer?

A. No, sir.

Cross-examination.

(Mr. Glover:)

Q. You and Mr. Will Summers, a witness, have been discussing this case back there in the room, haven't you?

A. No, sir.

Q. Didn't you talk it over before dinner?

A. Well, yes, sir; before we came down here.

Q. Didn't you talk it over right there in that room?

A. With Mr. Donham.

Q. Didn't you talk it over there between yourselves before Mr. Donham came in?

A. No, sir; nothing only what I said to Mr. Donham.

Q. You never discussed it between you and Mr. Harris or Mr. Williams that he was not discharged but he was just let out and you kept that as a secret, wasn't it, and this is the first time you ever mentioned the salary or the Sabbath question?

A. No, sir; just him and I.

Q. Did he suggest that to you? How did you come to get into the Sunday question?

A. We didn't get on to anything in there. I knew all the time.

Q. You say he was baggage man down there?

A. Well, he handled baggage part of the time, and part of the time he handled freight.

Q. He was an extra baggage man, wasn't he?

A. Well, I don't know.

Q. Wasn't that the way you carried him?

A. He carried him on the extra roll, and he did whatever we wanted him to work at.

Q. Did you have anything to do with it?

A. When-er Mr. Williams wasn't there. Mr. Jones was there or a while, he worked a few days after he was employed.

Q. Did you ever have a check down there for Mr. Ault?

A. Yes, sir.

Q. When did it come?

A. I believe it came in the night of the 6th day after he quit.

Q. Where is that check now?

A. I believe we sent it back to the superintendent just a short time ago.

Q. Did you ever tender him that check at all?

A. Yes, sir.

Q. When?

A. I didn't tender it to him.

Q. Who did you tender it to?

A. His lawyer, Mr. Smith, I believe, wasn't it?

Q. You tendered it to Mr. Smith?

A. Yes, sir.

Q. You did that, did you?

A. Yes, sir; it was in the former trial.

Q. Aren't you mistaken, didn't Mr. Williams come into court and tender \$31.20, wasn't that what was done?

A. That wasn't a pay check; that was a time check, that was, that he was given to sign in person, that time check.

Q. It wasn't a pay check?

A. That wasn't.

Q. Where was that sent from?

A. From the Superintendent's office.

Q. Did you attend to that check down there?

A. There was a check for about nine dollars and something.

Q. Oh, well, he didn't—

A. And the time check was for that difference?

Q. How come it to come by two different checks?

A. Well, we have two pay-days a month. He worked part of the time in one month and part of the time in another.

Q. You haven't got them now where you could get hold of them, have you?

A. No, sir; he sent them to the Superintendent.

78 Q. Now, what did Mr. Ault tell you and Mr. Williams that his contract with Mr. Jones was, didn't he tell you that he was to have \$2.50 a day, or twenty-five cents an hour?

A. No, sir; I didn't hear anything about that.

Q. You never heard of that before?

A. No, sir. I heard about it after he had come after it and I had offered him the money.

Q. Didn't you hear it down there on Saturday when Mr. Williams told him he could not use him any further, and that he could not pay him \$2.50 and he would let him go.

A. No, sir.

Q. What did he tell him about the \$2.50 a day?

A. He didn't tell him anything that Saturday.

Q. Well, did you ever hear Williams say anything about \$2.50 a day?

A. No, sir; not that day.

Q. Well, any time since that?

A. Of course, we have discussed it since he refused to accept what we offered him. He said it should be \$2.50 a day.

Q. Wasn't you down there in the office when Mr. Ault's wife came down there to get his check?

A. She came down with the order for the check and I told her——

Q. Why didn't you deliver the check to her then?

79 A. Because he had to sign this check in our presence.

Q. What check?

A. His check; this time check.

Q. What difference does it make to the railroad company where he signs it if it is made out to him?

A. Well, he had to sign for this particular time check, and then I would pay him the cash.

Q. On that particular check?

A. Part of it, part of his salary.

Q. You never did have a check there for his money?

A. For part of it.

Q. I asked you if you had a check there for the money?

A. We had two checks.

Q. Well, did you ever have any checks for his salary, both of them together, that was for his money?

A. Yes, sir; one was a pay check and one was a time check. One was a pay check for about \$9.00, I don't know just exactly now, and the other was a time check for the days after this pay check was made out for.

Q. Well, the time check always comes in after a man is discharged?

A. Yes, sir.

Q. They sent that in, did they?

A. Well, he wanted his time and we sent in for it.

Q. You always send in for a time check when a man is discharged?

80 A. Sure; yes, sir.

Q. That came down there, didn't it?

A. If he quits, or we discharge him, if he doesn't want to wait until the following pay-day, we send in for a time check for him.

Q. Don't you know, as a matter of fact, if a man quits he don't get his money until the next pay-day?

A. If he doesn't want to wait we send in for a time check. It is customary for them to wait, but he—if he does not want to wait, then we send in for a time check. There is two or three different ways you can get money.

Q. You might get money lots of ways, but I will ask you if it isn't true, as a matter of fact, that when a man voluntarily quits, that he gets his check on the regular pay-day of the company, just like he would if he was to work on; but if he is discharged, don't he get a time check for the balance due him.

A. Yes, sir.

Q. And didn't you get a time check down there?

A. Yes, sir; we got a time check.

Q. You say you never did hear anything about that \$2.50 a day until this was all over?

A. No, sir.

Q. You just right lately found that out?

A. It has been several weeks, months, since——

81 Q. Didn't Mr. Ault come down there to make arrangements with you to get his money?

A. No, sir.

Q. He never did speak about it?

A. He never did call for his time check at all.

Q. His wife did?

A. Yes, sir; his wife did with an order from him.

Q. Why didn't you deliver it then?

A. Because we wouldn't deliver those checks only in person.

Q. Don't you know that the reason you didn't deliver him the time check there that you held up on that saying he had had his finger mashed and you wanted him to sign a release or discharge there before you would deliver him that, isn't that true?

A. No, sir.

Q. That isn't true?

A. No, sir.

Redirect examination.

(Mr. Donham:)

Q. What is the rule when a man quits of his own accord with reference to time checks, if there is any rule?

A. The same as in any other case, if he wants his time before his pay-day comes around we always write our superintendent and ask him to send us the time for this fellow.

82 Q. Is that time check any indication as to whether he has been discharged or quit of his own accord?

A. It is not.

Q. It is no indication whatever?

A. No, sir.

Witness excused.

83 Miss PEGGY YOUNG, having been first duly sworn, testified as follows:

Direct examination.

(Mr. Donham:)

Q. Your name is Miss Peggy Young?

A. Yes, sir.

Q. What is your occupation?

A. Stenographer.

Q. Where are you employed at present?

A. At the Bank of Malvern, public stenographer in the Bank of Malvern.

Q. Did you ever work for the railroad company?

A. Yes.

Q. When?

A. From May 10th until November 1st, 1918.

Q. Here at Malvern?

A. Yes, sir.

Q. What position?

A. Stenographer and billing clerk.

Q. Were you working there at the same time that Mr. Ault, the plaintiff in this case, was working there?

A. Yes, sir.

Q. Do you know whether or not he quit the services of the company of his own accord or whether he was discharged?

A. Well, from the conversation that I heard, I should judge that he quit of his own accord.

84 Q. Well, just tell the jury what you heard?

A. He came in the front office, I was sitting by Mr. Jones, at my desk, and he said that he could not take the job any longer; that he could not keep the job any longer because it required Sunday work and he being a minister could not do that.

Q. That is all.

Cross-examination.

(Mr. Glover:)

Q. Was anything said about the price he was getting there?

A. Not that I heard.

Q. You never heard of him wanting \$2.50 a day?

A. No, sir.

Q. You never heard a word about that?

A. No, sir.

Q. Did you have access there to the records, or custody of the records showing what they were paying the men?

A. No, sir.

Q. Did you know what the men were drawing there?

A. No, sir.

Q. Have you talked to anybody about this case?

A. Only the attorney.

Q. Who did you talk to?

A. I talked to Mr. Donham.

Q. This gentleman here?

A. Yes, sir.

85 Q. You refused to talk to me about it, didn't you?

A. I did not refuse.

Q. Didn't you say that you would not talk to anybody but the attorney for the railroad company?

A. No, sir; I told you, Mr. Glover, I would talk to you in his presence.

Q. You wouldn't talk to me alone?

A. No, sir.

Q. You said you wanted to talk to me in his presence?

A. I said I wanted another lawyer to be present.

Q. Didn't you say you wanted the lawyer on 'my' side to be present?

A. I didn't say the lawyer on 'My' side.

Q. Didn't you?

A. No, sir.

Q. Didn't you state here the other day in the presence of a number of people here in the court house, and didn't you tell also in the Bank of Malvern, that if I knew some of the things that had occurred down there that Mr. Ault would prevail in this case?

A. Absolutely no. No, sir.

Q. You did not?

A. No, sir; I did not.

Redirect examination.

(Mr. Donham:)

Q. You never saw me before this morning, did you?

86 A. No, sir; except once.

Q. Where?

A. I saw you in the court room here last Monday morning.

Q. A week ago?

A. Yes, sir.

Q. I mean, I was never introduced to you before today?

A. No, sir.

Q. Did you ever speak to me about this case until after you went into the witness room?

A. No, sir.

Q. You made a written report about the matter after suit was filed in the J. P. Court, a written statement about the matter?

A. Yes, sir.

Q. I believe you have stated that there was nothing whatever mentioned about salary?

A. Nothing that I heard, no, sir.

Q. The thing you did hear you have already related?

A. Yes, sir.

Recross-examination.

(Mr. Glover:)

Q. What was the written report you made?

A. Mr. Donham has it.

Q. Let's see that thing. This was made to the claim agent, was it not?

A. No, sir.

87 Q. Do you know Mr. Milestone?

A. Yes, sir.

Q. Was he down there?

A. No, sir.

Q. How come you to make this and send it in?

A. As well as I remember, we had instructions to send in a statement similar to that.

Q. Who instructed you to do that?

A. Mr. Williams told me to do it.

Q. Were you in Mr. Williams' employ?

A. Yes sir. I don't know who the statement was sent to.

Q. He witnessed it himself, didn't he?

A. No, he didn't witness that, that I know of.

Q. Isn't that his name right there?

A. Oh, yes, sir, right there.

Q. That is your statement?

A. Yes, sir.

Q. I will ask you if you didn't tell him in this statement that he is complaining about the salary there and that he could not live on the salary of \$45 a month?

A. I don't know; I have forgotten.

Q. If you said anything about \$45 you don't know it?

A. No, sir; if I have I have forgotten it.

88 Q. You wouldn't have known anything about \$45 if he hadn't said so, would you? You said he never said anything about his salary, he never complained in any way about his salary, and that the only thing that he said there was about the Sunday work, is that what you said?

A. Yes, sir.

Q. And that is what you wrote in?

A. To the best of my knowledge I don't recollect.

Q. I wish you would read that over and see if you didn't say in there that you said something about \$45 also?

Q. What about it?

A. Why, it is there, I don't deny that. I said I didn't know that I wrote it, because I didn't remember it.

Q. Now, you say you did?

A. I said that I couldn't remember.

Q. Why did you put it in there?

A. Because I remembered it, when it happened, what happened at the time.

Q. You remember better at that time than you do now?

A. Yes, sir. It has been quite awhile ago.

Q. So you do say now that there was some discussion about the \$45 per month?

A. According to that there was.

Q. You wrote that in there?

A. Yes, sir.

Redirect examination.

(Mr. Donham:)

89 Q. I will ask you whether or not he made any complaint or assigned as a reason that he was quitting that his salary was not sufficient, and that he was only getting \$45 per month?

A. No, sir.

Q. The reason he assigned, what was it?

A. That he was a minister and did not want to work on Sunday.

Q. So as to there being a controversy about salary, you said nothing about the controversy here in this letter about salary?

A. No, sir.

Recross-examination.

(Mr. Glover:)

Q. I will ask you if you did not state in this that he did not care to work on Sunday and that the salary of \$45 per month was insufficient to support his family, you wrote that in, didn't you?

A. Yes, sir.

Q. That is all.

Witness excused.

90 Mr. Donham: Let the record show that the plaintiff admits that tender was made to him on the 19th day of August, 1918, of \$31.20.

Court: That is the agreement, is it, Gentlemen?

Mr. Glover: Yes, sir; we admit that.

This was all the testimony introduced by the plaintiff in this case.

This was all the testimony introduced by the defendant in this case.

This was all the testimony introduced by either party in this case.

91 *Instructions.*

Whereupon the Court orally charged the jury as follows:

Gentlemen of the Jury: The plaintiff, Mr. H. A. F. Ault, sued the defendant for wages alleged to be due, and penalty for non-payment by the defendant. It devolves upon the plaintiff in this case to prove his contract, and to prove that he was discharged and

made his demand, and that he was refused further employment, and that he was not paid within seven days after making demand after the expiration of the seven days thereafter. It devolves upon the plaintiff to make out his case by a fair preponderance or greater weight of the testimony. In weighing the testimony, gentlemen of the jury, you may take into consideration the demeanor of the witness upon the stand, their willingness or unwillingness to testify, if any shown, the reasonableness or unreasonableness of their testimony, the means of knowing the facts about which the witnesses testify, and the result and the interest, if any, of any witness, or that any witness may have in the result of your verdict. If the plaintiff has made out his case by a fair preponderance of the testimony, your verdict will be for the plaintiff. If he has failed to make out his case, your verdict will be for the defendant. I will read you gentlemen the written instructions that will govern you as to the law in the case.

92 To which action of the court in so charging and instructing the jury on its own motion, the defendant, at the time, excepted, and asked that its exception be noted of record, which was and is accordingly done.

Plaintiff's Instructions.

Whereupon, the plaintiff thereupon asked the court to instruct the jury, as follows:

"#1.

"The court instructs the jury that if you believe from the evidence that the plaintiff was in the employ of the defendant and that according to the terms of his employment he was receiving wages at the rate of two dollars and a half per day and that on the 28th day of July, 1918, the defendant discharged the plaintiff or refused to longer employ him at the contract price and at the time of his discharge there was due him for services rendered said company the sum of fifty (\$50) dollars and the plaintiff demanded payment of same and requested the agent at Malvern under whom he was employed to pay him the money due him or have a valid check therefor sent to the said agent at Malvern within seven days and that more than seven days after he was discharged or refused longer employment he applied to said agent for his money due him or a valid check therefor, but the defendant through its agents and servants failed, neglected and refused to pay the plaintiff the amount due him for work performed for the defendant and still fails to pay said wages that it will be your duty to find for the plaintiff in the sum of fifty dollars (\$50.) for his actual wages due him and in addition to said amount you will find for the plaintiff in the sum of \$2.50 per day from the 28th of July to this date as a penalty for the non-payment of his wages within seven days after he was discharged or refused longer employment and upon his making a demand for same more than seven days after said discharge."

By the Court: I will have to read the whole instruction again.

(Reading:) "The court instructs the jury that if you believe from the evidence that the plaintiff was in the employ of the defendant and that according to the terms of his employment he was receiving wages at the rate of two dollars and a half per day and that on the 28th day of July, 1918, the defendant discharged the plaintiff or refused to longer employ him at the contract price and at the time of his discharge there was due him for services rendered said company the sum of fifty (\$50) dollars and the plaintiff demanded payment of same and requested the agent at Malvern under whom he was employed to pay him the money due him or have a valid check therefor sent to the said agent at Malvern within seven days and that more than seven days after he was discharged or
94 refused longer employment he applied to said agent for his money due him or a valid check therefor, but the defendant through its agents and servants failed, neglected and refused to pay the plaintiff the amount due him for work performed for the defendant and still fails to pay said wages that it will be your duty to find for the plaintiff in the sum of fifty dollars (\$50.) for his actual wages due him and in addition to said amount you will find for the plaintiff in the sum of \$2.50 per day from the 28th of July to this date as a penalty for the non-payment of his wages within seven days after he was discharged or refused longer employment and upon his making a demand for same more than seven days after said discharge."

The court thereupon granted and gave said requested written instruction #1 asked by the plaintiff and so instructed and charged the jury, to which action of the court the defendant, at the time, excepted and asked that its exception be noted of record, which was and is accordingly done; and the court, of its own motion, read to the jury, plaintiff's requested written instruction #1 a second time, to which action of the Court the defendant, at the time excepted, and asked that its exceptions be noted of record, which was and is accordingly done. The reading of the above instruction the second time was rendered necessary because of correction of the phraseology. It appears in the Bill of Exceptions both times as corrected.

95

Defendants' Instructions.

Whereupon, the defendant asked the Court to instruct the jury as follows:

"#A."

"You are instructed that plaintiff is not entitled to recover any penalty.

The court refused to grant said instruction #A, as requested by the defendant, and refused and failed to so instruct and charge the jury, to which action of the Court, the defendant, at the time excepted and asked that its exceptions be noted of record, which was and is accordingly done.

#1.

You are instructed to find for defendant.

The Court refused to grant said instruction #1 requested by the defendant, and refused and failed to so instruct and charge the jury, to which action of the court, the defendant, at the time excepted and asked that its exceptions be noted of record, which was and is accordingly done.

" #2.

"You are instructed that if the plaintiff quit the service of the company of his own accord then he cannot recover any penalty, and would be entitled to recover only the actual wages due him."

96 The court thereupon granted and gave said instruction #2 requested by the defendant, and so charged and instructed the jury, to which action of the court, the plaintiff, at the time, excepted, and asked that his exception be noted of record, which was and is accordingly done.

" #3.

"You are instructed that if the plaintiff quit his work because he did not want to work on Sunday, then he can recover only the actual amount of wages due him, and cannot recover a penalty."

The court thereupon granted and gave said instruction #3 requested by the defendant, and so charged and instructed the jury, to which action of the court, the plaintiff, at the time, excepted, and asked that his exception be noted of record, which was and is accordingly done.

" #4.

"You are instructed that when one is discharged, before he can recover a penalty he must have demanded of his foreman or the keeper of his time that his money or a valid check therefor be sent to a place where a regular agent is kept and even though you should believe that plaintiff was discharged, yet he cannot recover a penalty unless it has been shown by a preponderance of the evidence that he made such demand of his foreman or the keeper of his time; and unless it has been so shown even though you should believe that he was so discharged it would be your duty to

97 find for the defendant as to plaintiff's claim for penalty."

The court thereupon granted and gave said instruction #4 requested by the defendant, and so charged and instructed the jury, to which action of the court, the plaintiff, at the time, excepted, and asked that his exception be noted of record, which was and is accordingly done.

After argument of counsel, the jury thereupon retired to consider of its verdict, and thereafter returned the following verdict into court, to-wit:

"We, the jury, find for the plaintiff in the sum of \$50.00 as debt for labor also \$2.50 per day as penalty from the 28th day of July, 1918, until the present date.

J. M. CALDWELL,
Foreman."

To which action of the jury in returning the above and foregoing verdict, the defendant, at the time, excepted, and asked that its exception be noted of record, which was and is accordingly done.

Judgment was rendered on this verdict for \$50.00 debt and \$390.00 penalty and costs.

Whereupon, the defendant was given — days in which to file a Motion for New Trial; and within the time allowed by the court, the defendant filed said motion for a New Trial, which is as follows:

98

Motion for New Trial.

(Caption Omitted.)

"Come the defendants, Missouri Pacific Railroad Company, and Walker D. Hines, Director General of Railroads, and move the court to set aside the verdict returned herein and the judgment rendered thereon and grant unto them a new trial of this cause, and for grounds of said motion, state:

"(1). That the verdict of the jury is contrary to the law.

"(2). That the verdict of the jury is contrary to the evidence.

"(3). That the verdict of the jury is contrary to the law and the evidence.

"(4). That the verdict of the jury is excessive.

"(5). That the verdict of the jury as to the penalty is unsupported by the evidence.

"(6). That the court erred in overruling defendant's objection made to the manner in which plaintiff's counsel on direct examination suggested the answers desired from the witness, H. A. F. Ault, relative to the plaintiff being discharged and refused further employment by the agents and servants of defendants, and further erred in then permitting the witness to go ahead and testify relative to the alleged facts which had been repeatedly suggested to said witness by his counsel.

"(7). That the court erred, over the objection of defendants, in permitting to be introduced in evidence by plaintiff, the purported written demand for payment of wages signed by H. A. F. Ault, the plaintiff, and erred in permitting the same to be read to and considered by the jury.

"(8). That the court erred, over defendant's objection in granting and reading to the jury plaintiff's requested written instruction #1.

99

"(9). That the court erred in reading plaintiff's requested instruction #1 a second time to the jury.

"(10). That the court erred in refusing to grant and give defendants' requested written instruction #1.

"(11). That the court erred in refusing to grant and give defendants' requested written instruction marked "A".

"(12). That the court erred in refusing to grant and give a peremptory instruction for defendants.

"(13). That the court erred in overruling the motion of defendants to dismiss this cause as to the Missouri Pacific Railroad Company.

"(14). That the court erred in overruling defendant's motion for a peremptory instruction as to the penalty.

"Wherefore, defendants pray that the court set aside the verdict of the jury returned herein and the judgment of the court rendered thereon and that they be granted a new trial of this cause, and for all other and proper relief."

The court thereupon overruled said motion for a new trial, to which action of the court in overruling said motion, the defendant, at the time, excepted, and asked that its exception be
100 noted of record, which was and is accordingly done.

Thereupon, the defendant prayed an appeal to the Supreme Court of Arkansas, which was granted, and defendant was given Sixty days in which to prepare its Bill of Exceptions, which, within the time allowed, was presented and signed by the Judge.

* * * * *

The foregoing Bill of Exceptions was, on this the 27th day of March, 1919, presented to me, was examined and found correct and signed and ordered to be filed as a part of the record in this case.

J. C. ROSS,
Judge.

O. K.

Attorneys for Plaintiff.

O. K.

W. R. DONHAM,
Attorney for Defendant.

Filed March 27th, 1919. R. R. Chamberlain, Clerk.

101

Certificate of Transcript.

STATE OF ARKANSAS,

County of Hot Springs, ss:

I, R. R. Chamberlain, Clerk of the Circuit Court within and for the County aforesaid, do hereby certify that the within and foregoing pages of typewritten matter contain a true, accurate, complete and compared copy of all the pleadings, papers, files, and entries of proceedings, in the cause named in the caption, as the same now appear by comparing with the originals thereof, now on file and of record in my office of the records of Hot Springs County, Arkansas.

In testimony whereof, I hereunto set my hand as such Clerk and affix the seal of said Court, at my office, in Malvern, Arkansas, this the 22nd day of April, 1919.

[SEAL.]

R. R. CHAMBERLAIN,
Clerk of Hot Springs Circuit Court.

102

Fee Bill.

Clerk's fees	\$14.45
Sheriff's fees	3.80
Justice of the Peace Fees	2.90
Constable Fees85
Witness Fees	4.50
County Tax	3.00
Judgment	440.00
Total	\$469.50
Transcript	\$ 28.50
	498.00

Clerk's Certificate.

STATE OF ARKANSAS,

County of Hot Springs, ss:

I, R. R. Chamberlain, Clerk of the Circuit Court within and for the County aforesaid, do hereby certify that the above and foregoing fee bill is true and correct to the best of my knowledge and belief, and as the same now appears on Civil Fee Book No. 2, at page 8, of the records of Hot Springs County, Arkansas.

In witness whereof, I hereunto set my hand as such Clerk, and affix the seal of said Court, this the 22nd day of April, 1919.

[SEAL.]

R. R. CHAMBERLAIN,
Clerk of Hot Springs Circuit Court.

102½ No. 5852. Missouri Pacific Railroad Co., et al., vs. H. A. F. Ault. Hot Springs, Clk. J. C. Ross, J. \$11.50. Transcript. Filed July 7, 1919. W. P. Sadler, Clerk, by J. W. Campbell, D. C.

103 STATE OF ARKANSAS,
 In the Supreme Court, ss:

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 26th day, being the fourth Monday of May, A. D. 1919, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 3rd day of November, 1919, a day of said term:

MISSOURI PACIFIC RAILROAD COMPANY and WALKER D. HINES,
Director General of Railroads, Appellants,

v.

H. A. F. AULT, Appellee.

Appeal from Hot Springs Circuit Court.

This cause being regularly called, come the parties thereto by their attorneys, and said cause is submitted upon the transcript of the record and the briefs filed, and is by the Court taken under advisement.

104

May Term, 1919.

Caption Omitted.

November 17, 1919.

This cause came on to be heard upon the transcript of the record of the circuit court of Hot Springs county, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things, affirmed with costs.

It is further considered that said appellee recover of said appellants all his costs in this Court in this cause expended, and have execution thereof.

105 In the Supreme Court of Arkansas, Nov. 17, 1919.

No. 216.

MO. PAC. RAILROAD COMPANY

v.

AULT.

Opinion.

HUMPHREYS, J.:

Appellee brought suit against the Missouri Pacific Railroad Company, before D. M. Noble, a justice of the peace in Fenter township, Hot Springs county, Arkansas, to recover the sum of \$50 as wages and a penalty prescribed by Act 210 of the Acts of the Legislature of 1905, amending section 6649 of Kirby's Digest. The act, in so far as it relates to this case, is as follows: "That section 6649 of Kirby's Digest shall be amended so as to read as follows: Section 6649. Whenever any railroad company or corporation or any receiver operating any railroad engaged in the business of operating or constructing any railroad or railroad bridge, shall discharge with or without cause or refuse to further employ any servant or employee thereof, the unpaid wages of any such servant or employee then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge or refusal to longer employ; any such servant or employee may request of his foreman or the keeper of his time to have the money due him, or a valid check therefor, sent to any station where a regular agent is kept, and if the money aforesaid, or a valid check therefor, does not reach such station within
105 seven days from the date it is so requested, then as a penalty for such nonpayment the wages of such servant or employee shall continue from the date of the discharge or refusal to further employ, at the same rate until paid."

Default judgment was rendered in favor of appellee in the magistrate's court for \$50 and \$2.50 per day as a penalty for nonpayment of the wages from July 9, 1918, until the payment of said sum. An appeal was taken from that judgment to the circuit court in said county, and, on the 20th day of January, 1919, the Missouri Pacific Railroad Company filed an answer, denying the indebtedness or liability for a penalty, the discharge or refusal to continue appellee in its employment, any request or demand by appellee on his foreman or time keeper to send the amount claimed to be due him as wages, or a valid check therefor within seven days to the agent at Malvern, or that appellee applied to said agent, after seven days, for his wages, or a valid check therefor. On the 29th day of January, following, appellee filed a motion to substitute in his place, as defendant, Walker D. Hines, Director General of Railroads. Over the objection of appellant, the court refused to make the substitution, but made the Director General a party defendant. The cause then proceeded to trial

and was submitted to a jury upon the pleadings, evidence and instructions of the court. The jury returned the following verdict: "We,

the jury, find for the plaintiff in the sum of \$50 as debt for
107 labor; also \$2.50 per day as penalty from the 28th day of July, 1918, until the present date. J. M. Caldwell, Foreman."

Thereupon, a judgment was rendered against appellants for \$50 debt, and \$390 penalty. From that judgment, an appeal has been duly prosecuted to this court.

Appellants first insist that the undisputed evidence showed that appellee voluntarily quit the service of appellants and that it was error to render judgment against them for a statutory penalty on the theory of a discharge or refusal to further employ appellee. It is said that because the contract required appellee to work on Sunday, his failure to work in person on the Sabbath day amounted to a breach of his contract. The evidence tended to show that appellee and his employer had agreed that he might substitute, at his own expense, some one else to work on the Sabbath day. Under such an arrangement, a failure to report in person and work on the Sabbath day would not constitute a voluntary cessation of appellee's duties under the contract. It was a question for the jury to say whether or not such an arrangement was made under the contract of employment. Again, it is said that, because appellee refused to accept employment as a porter or baggage man at \$45 per month, therefore, he voluntarily quit the service of said railroad company. The evidence disclosed that in the month of July, 1918, appellee was employed by W. W. Jones, station agent at Malvern, as a freight
108 trucker at the rate of twenty-five cents an hour, or \$2.50 a day for a ten hour day; that after about ten days, W. W. Jones entered the army and was succeeded by E. B. Williams; that on or about the 27th day of July, appellee received information that Williams had placed him on the roll as porter, or baggageman, at a salary of \$45. a month, and intended to pay him only a \$1.50 per day for the entire time he had worked; that he went to see Williams, who turned to the record, under the heading "porter", and told appellee he could not allow him more than \$45 a month, and that it was up to him to accept or refuse that money; that appellee contended he had not been working as porter and could not support his family on that amount; that Williams responded he could not allow more, whereupon, appellee informed him he might have the job as soon as he paid him off; that the agent sent a man to take his place, but appellee refused to let the new man go to work until he received his pay.

The appellee then consulted an old employee, who advised him that he could not keep the new man from going to work; that on the next day, Sunday, his substitute was displaced by the new man. We think the refusal of appellants to allow appellee to work longer in the capacity of freight trucker, at 25 cts. an hour, and their offer to retain him as porter or baggageman, at a salary of \$45 per month, was tantamount to a discharge from and a refusal to further employ appellee in his original position, within the meaning of section 1,

Act 210 of the Acts of the Legislature of 1905. Under this construction of said act, as applied to the facts in this case, it can not be said that appellee voluntarily quit the service of appellants.

It is next insisted that appellee was not entitled to a penalty because the undisputed evidence showed that he did not bring himself within that provision of said act which required the employee, when discharged or when refused employment, to request his foreman or keeper of his time to send the money due him, or a valid check herefor, to a station agent, at a station where a regular agent is kept. Appellee testified that after he made up his mind not to prevent the new man from taking his place, he demanded the wages due him from E. B. Williams, his immediate employer, and the man who kept his time; that Williams responded that the money would be here in seven days. The undisputed evidence also showed that his conversation occurred in the Malvern depot, where appellee had been working and where E. B. Williams was employed as the regular station agent. This court held, in the case of *Biggs v. St. L. I. M. & S. Ry. Co.*, 91 Ark. 122 (quoting the sixth syllabus) that:

"Where, at the time a servant was discharged by a railroad company, his foreman notified him that his money would be sent to a station named where a regular agent was kept, to which the servant acquiesced, this was equivalent to a request by the servant to have the money due him sent to the station, and sufficient to entitle him to recover the statutory penalty for failure to send the money."

We think the evidence in this case brings it clearly within the rule laid down in *Biggs v. St. L. I. M. & S. Ry. Co.* supra.

Lastly, appellant insists that it was erroneous to render any judgment against the Missouri Pacific Railroad Company, for the reason that the undisputed evidence showed that at the time of the employment and discharge of appellee the railroad was being operated by Walker D. Hines, Director General of Railroads in the United States of America, and not by said railroad company. Under authority granted by Congress on August 29, 1916, the President issued a proclamation on December 26, 1917, for the Director General to take possession of certain railroads in the United States, including the Missouri Pacific Railroad Company. On March 21, 1918, thereafter, Congress passed a statute to the effect that, "Carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with an order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

111 If the word "carriers" used in this act had reference to the Director General, who was operating said railroad, then it was improper to render a judgment against the Missouri Pacific Railroad Company. We are unable to find anything in the language or context used that indicates that the word "carriers" refers to the Director General. On the contrary, the plain meaning is that so far as suing and being sued is concerned, the railroad occupied exactly the same status after being taken over by the Government as before. The case of *Rutherford v. Union Pacific Rd. Co.*, 254 Fed. 880, cited by appellant in support of its position that the statute in question had reference to the Director General, and not to the original corporation, argued that the Director General occupied the same position with reference to the railroad as receivers do. We do not think the position occupied by the Director General is analogous to that of a receiver. The attitude of a receiver is that of a trustee for the benefit of creditors. The attitude of the Director-General is that of an agent of the Government taking over the railroads as a necessity of war, under congressional and presidential authority. A receivership implies insolvency; the operation of the railroad under a Director General does not carry such an implication. We think the later case of *Jensen v. Lehigh Valley Rd.*, 255 Fed. 795, is the better reasoned case. It was said by Judge Hand in the latter case: "It appears to me that Congress pretty clearly meant, by the term 'carriers' the corporations themselves, and that the right to sue them must remain certainly till it is changed by some valid provision."

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It may be contended that the statute in question is unconstitutional, because, if the claim is reduced to a judgment and enforced against the property of the corporation, it would amount to a taking of private property without due process of law from the corporation to pay a liability incurred by the act of the federal authorities operating the road. We do not understand that such would be the effect of the act. Immunity from loss, as well as assurance of a reasonable return upon the investment, was guaranteed the railroad corporations by the Government. Act Mar. 21, 1918, c. 25, 40 Stat. 451. Under such a guarantee, the enforcement of judgments against the property of the railroad corporations during the control by federal authorities could not have the effect of confiscating their property. Immunity from loss and assurance of gain are a complete answer to any contention that the enforcement of such judgment would be the taking of private property without the process of law, or the taking of private property for public purposes without just compensation. We think the act constitutional.

No error appearing in the record, the judgment is affirmed.

113

November Term, 1919.

(Caption Omitted.)

December 1, 1919.

The appellants having within the time allowed by law filed a petition for re-hearing, and duly served the same, said petition is now submitted, with the supporting briefs, and is by the Court taken under advisement.

114

In the Supreme Court of Arkansas.

MISSOURI PACIFIC RAILROAD COMPANY and WALKER D. HINES,
Director General of Railroads, Appellants,

VS.

H. A. F. AULT, Appellee.

Petition for Rehearing.

Come the appellants, Missouri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, and petition the court for a rehearing herein, and for cause, state:

1. The court erred in sustaining the judgment against appellant, Missouri Pacific Railroad Company for the reason that the undisputed evidence showed that at the time of the employment and discharge of appellee, the railroad was being operated by Walker D. Hines, Director General of Railroads of the United States of America, and not by said railroad company.

2. The court erred in sustaining the judgment for penalty against appellant, Walker D. Hines, Director General of Railroads, for the reason that General Order No. 50, promulgated by W. G. McAdoo, Director General of Railroads, directs that all suits arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad by the Director General of Railroads shall be brought against the Director General and not otherwise, provided however, that this order shall not apply to actions,
115 suits or proceedings for the recovery of fines, penalties and forfeitures.

Wherefore, appellants respectfully pray that a rehearing be granted and that the judgment of the lower court as to appellant, Missouri Pacific Railroad Company, be reversed and dismissed, and that the judgment as to appellant, Walker D. Hines, Director General of Railroads, for penalty be reversed and dismissed.

E. B. KINSOWRTHY,

W. R. DONHAM,

Attorneys for Appellants.

I, W. R. Donham, one of the attorneys for the appellants herein, state that I have examined the opinion rendered by the court in this cause, and that I verily believe there is merit in the petition for rehearing above set out.

W. R. DONHAM,

Filed Nov. 26, 1919. W. P. Sadler, Clerk.

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November Term, 1919.

(Caption Omitted.)

December 8, 1919.

Being fully advised, the petition filed for a rehearing in this cause, is by the Court overruled.

117 SUPREME COURT, STATE OF ARKANSAS, ss:

I, W. P. Sadler, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of The Missouri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, Appellant, vs. H. A. F. Ault, Appellee, and also the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this 6th February, 1920.

[Seal of the Supreme Court of Arkansas.]

W. P. SADLER,

Clerk Supreme Court of Arkansas.

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In the Supreme Court of Arkansas.

MISSOURI PACIFIC RAILROAD COMPANY, and WALKER D. HINES,
Director General of Railroads, Appellants,

vs.

H. A. F. AULT, Appellee.

Assignment of Errors.

Now come the Appellants, Missouri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, and file herewith their petition for Writ of Error to the Supreme Court of the United States, and say there are errors in the record of the proceedings in the above entitled cause and for the purpose of having the same reviewed and corrected in the Supreme Court of the United States appellants make the following Assignment of Errors, to-wit:

First. The Supreme Court of Arkansas erred in affirming the action of the trial court whereby that court denied the petition of

the Missouri Pacific Railroad Company that Walker D. Hines, Director General of Railroads be substituted in the action as defendant in the place of Missouri Pacific Railroad Company, and the Missouri Pacific Railroad Company be dismissed from the action; and erred in holding that Missouri Pacific Railroad Company should not be dismissed from the action.

Second. Said Court erred in holding that under General Order No. 50 of the Director General of Railroads, it was not necessary for the Director General of Railroads to be substituted as a party defendant in place of the Missouri Pacific Railroad Company and Missouri Pacific Railroad Company dismissed from the action.

Third. Said Court erred in sustaining the judgment of the trial court against Appellant, Missouri Pacific Railroad Company.

Fourth. Said Court erred in holding and deciding that judgment could be lawfully rendered against Missouri Pacific Railroad Company for a cause of action arising in a transaction of Appellee, H. A. F. Ault, with the employees and agents of the Director General of Railroads, growing out of the possession, use control and operation of the railroad of the Missouri Pacific Railroad Company by the Director General of Railroads of the United States.

Fifth. Said Court erred in holding that the operation and enforcement of judgment against Missouri Pacific Railroad Company for a cause of action arising during Federal Control of the Railroad of said Company and growing out of the possession, use, control and operation of said railroad by the Director General of Railroads for the United States, would not amount to a taking of private property without due process of law contrary to the provisions of Section 1, of Article Fourteen of the Articles in Amendment of the Constitution of the United States.

Sixth. Said Court erred in holding that Section 6649 of Kirby's Digest of the Statutes of Arkansas was valid and binding as against the Director General of Railroads for the United States, and in holding that said section 6649, authorized a judgment for penalty against the Director General of Railroads for the United States.

Seventh. The said Court erred in holding and deciding that the provisions of General Order No. 50 of the Director General of Railroads of the United States did not exempt and exclude the Director General of Railroads of the United States from any action, suit or judgment for the penalty provided by section 6649 of Kirby's Digest of the Statutes of Arkansas.

120 Eighth. Said Court erred in holding and deciding that under the Act of Congress of August 29, 1916, the President's Proclamation of December 26, 1917, the Act of Congress of March 21, 1918, providing for the possession and operation of the railroads of the United States by the United States Government, and

the lawful orders made pursuant to said statutes and Proclamations, the Director General of Railroads for the United States was not exempt and excluded from actions, suits or judgments for the penalty for non-payment of wages, provided by Section 6649 of Kirby's Digest of the Statutes of Arkansas.

Ninth. Said Court erred in holding that the evidence was sufficient to support the verdict in the action.

For which errors Appellants pray that the said judgment of the Supreme Court of Arkansas be reversed and judgment rendered in favor of Appellants, and for costs.

EDGAR B. KINSWORTHY,
ROBERT E. WILEY,
Attorney- for Appellants.

Filed Feb'y 2, 1920. W. P. Sadler, Cl'k, by J. H. Campbell,
D. C.

121 In the Supreme Court of Arkansas.

MISSOURI PACIFIC RAILROAD COMPANY, and WALKER D. HINES,
Director General of Railroads, Appellants,

vs.

H. A. F. AULT, Appellee.

Petition for Writ of Error.

Considering themselves aggrieved by the final decision of the Supreme Court of Arkansas in rendering judgment against them in the above entitled cause, the Appellants, Missouri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, hereby pray a Writ of Error from said decision and Judgment to the Supreme Court of the United States, and file herewith their assignment of errors.

EDGAR B. KINSWORTHY,
ROBERT E. WILEY,
Attorneys for the Appellants.

Writ of error allowed on filing of bond in sum of one thousand (\$1,000.00) dollars, which shall operate as supersedeas. Jan. 31, 1920.

E. A. McCULLOCH,
Chief Justice of the Supreme Court of Arkansas.

Filed Feb'y 2, 1920. W. P. Sadler, Cl'k, by J. H. Campbell,
D. C.

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In the Supreme Court of Arkansas.

MISSOURI PACIFIC RAILROAD COMPANY and WALKER D. HINES,
Director General of Railroads, Appellants,

v.

H. A. F. AULT, Appellee.

Bond.

Know all men by these presents:

That we, Missouri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, as principals, and United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto H. A. F. Ault, in the sum of one thousand dollars (\$1,000.00), to be paid by them, to which payment well and truly to be made we bind ourselves.

Signed and sealed this 31st day of January, 1920.

Whereas, the above named appellants seek to prosecute their writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of Arkansas,

Now, Therefore, the condition of this obligation is such that if the above named appellants shall prosecute their said writ of error to effect, and shall answer all costs and damages that may be adjudged against, each for himself as to the judgment against him or it, if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and effect.

MISSOURI PACIFIC RAILROAD
COMPANY AND
WALKER D. HINES,

Director General of Railroads.

By R. E. WILEY.

UNITED STATES FIDELITY &
GUARANTY COMPANY,

By WYLIE B. MILLER,

Att'y in Fact.

Approved Jan. 31, 1920.

E. A. McCULLOCH,

Chief Justice Supreme Court of Arkansas.

Filed Feb'y 2, 1920. W. P. Sadler, Cl'k, by J. H. Campbell,
D. C.

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In the Supreme Court of Arkansas.

MISSOURI PACIFIC RAILROAD COMPANY, and WALKER D. HINES,
Director General of Railroads, Appellants,

vs.

H. A. F. AULT, Appellee.

Writ of Error.

The President of the United States of America to the Honorable the
Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between Missouri Pacific Railroad Company, and Walker D. Hines, Director General of Railroads, and H. A. F. Ault, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Missouri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the records and proceedings aforesaid being inspected, the said Supreme Court may proceed further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, the 31 day of January, 1920.

[The seal of the District Court, Western Division, U. S. A.]

SID B. REDDING,
*Clerk of the District Court of the United
States, for the Western Division of the
Eastern District of Arkansas.*

By W. S. ALLEN,
D. C.

Filed Feby. 2, 1920. W. P. Sadler, Clk, by J. H. Campbell, D. C.

Allowed:

E. A. McCULLOCH,
Chief Justice of the Supreme Court of Arkansas.

124 SUPREME COURT, STATE OF ARKANSAS, ss:

I, W. P. Sadler, Clerk of the said Court, do hereby certify that there was lodged with me as such Clerk on February —, 1920, in the matter of Missouri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, versus H. A. F. Ault:

1. The original bond of which a copy is herein set forth.
2. Copies of the writ of error, as herein set forth,—one for each defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this February 6th, 1920.

[Seal of the Supreme Court of Arkansas.]

W. P. SADLER,
Clerk, Supreme Court of Arkansas.

125 *Citation.*

THE UNITED STATES OF AMERICA, ss:

The President of the United States to H. A. F. Ault, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Arkansas, wherein the Missouri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, are plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Arkansas, January 31, 1920.

E. A. McCULLOCH,
Chief Justice, Supreme Court of Arkansas.

STATE OF ARKANSAS,
County of Hot Springs, ss:

Service of the foregoing citation is hereby acknowledged and accepted by H. A. F. Ault, appellee, by receipt of copy of same, this 3rd day of February, 1920.

D. D. GLOVER,
Attorney for Appellee.

Filed Feby. 2, 1920. W. P. Sadler, Clk, by J. H. Campbell, D. C.

126 UNITED STATES OF AMERICA,
Supreme Court of Arkansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Arkansas, the City of Little Rock, this February 6th, 1920.

[Seal of the Supreme Court of Arkansas.]

W. P. SADLER,
Clerk Supreme Court of Arkansas.

Costs of Suit.

Costs in Circuit Court	\$29.50
Costs in Supreme Court	55.00
Transcript, pursuant to Writ of Error	40.00
Paid by Plaintiff in Error.	

Endorsed on cover: File No. 27,488. Arkansas Supreme Court. Term No. 733. Missouri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, Plaintiffs in Error, vs. H. A. F. Ault. Filed February 20th, 1920. File No. 27,488.